

LUTHRA & LUTHRA LLP

CHARTERED ACCOUNTANTS



INTERNATIONAL TAXATION ISSUE JUNE 2022

Highlights



- CBDT extends applicability of Safe Harbour Rules to AY 2022-23
- CBDT issues Notifications to facilitate Faceless Assessments, effective from Jun 6
- CBDT notifies 'Seventy Second Investment Company LLC' as sovereign wealth fund for Sec. 10(23FE) exemption
- CBDT provides guidance on cross-border disputes
- G7 Finance Ministers commit timely, effective implementation of two-pillar solution; Welcome OECD report on Tax Co-operation for 21st century
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News Highlights



CBDT extends applicability of Safe Harbour Rules to AY 2022-23

CBDT vide Notification No. 66/2022 dated 17th June, 2022 extends applicability of Safe Harbour Rules under Rule 10TD of Income-tax Rules to AY 2022-23. The board highlights that sub-rules (1) and (2A) shall now apply to AY 2022-23 also. These amended rules shall be deemed to come into force from April 1, 2022.

CBDT issues Notifications to facilitate Faceless Assessments, effective from Jun 6

CBDT issues Notification No. 61/2022 dated June 10, 2022, in supersession of Notification No. 23/2021 dated March 31, 2021, to facilitate the conduct of faceless assessment proceedings under Section 144B. Further, the Notification provides for assessment, review and verification units across the country by the income-tax authorities.

CBDT notifies 'Seventy Second Investment Company LLC' as sovereign wealth fund for Sec. 10(23FE) exemption

CBDT vide Notification No. 69/2022 dated June 27, 2022 has notified the sovereign wealth fund namely 'Seventy Second Investment Company LLC' as the specified person for the purpose of section 10(23FE) in respect of the investment made by it in India. According to said notification any income in the nature of dividend, interest, or long-term capital gain arising from an investment made by it in India on or after the date of publication of this notification in the Official Gazette but on or before 31-03-2024 shall be entitled for exemption subject to the fulfilment of specified conditions.



Further, in case of violation of any of the conditions as stipulated in clause (23FE) of section 10 of the Act and this notification shall render the Assessee ineligible for the tax exemption.



Indian/Global Updates



CBDT provides guidance on cross-border disputes

CBDT issues updated guidelines on MAP to address stakeholders' queries pursuant to MAP guidelines dated 7th August 2020.

The updated guidelines, provides that where a resident has opted for Vivad se Vishwas ('VsV') scheme for settlement of cases involving resolution of transfer pricing adjustments and it is accepted by Indian tax authorities, then the Competent Authority of other countries/specified territories may accept MAP applications from their taxpayers (which are AEs of Indian taxpayer) and notify the Competent Indian authorities. Indian authorities shall allow access to MAP but shall not deviate from the result arrived under the VsV. However, they may request the Competent Authority of the treaty partners to provide correlative relief.

Further, the said guidelines clarified that the non-resident taxpayers who opted for the resolution scheme (i.e. VsV) cannot go for the MAP on the same issues because the applicant has given up its right to access MAP.

CBDT highlighted that a couple of occasions have come to the notice of Competent Authorities where taxpayers have suppressed information (Example, invoking MAP in respect of adjustments made by one DTAA partner without mentioning the fact that adjustment has also been made by the other DTAA partner on the same transaction).

Therefore, CBDT stated in the updated MAP guidance that an Indian resident taxpayer making a MAP application in item (k) of Form 34F should provide all the facts of the case that can materially affect the negotiation process.

Therefore, the CBDT brought out the importance of good faith and interplay of MAP through its updated guidelines with other processes such as regular tax appeals, tax settlements etc.



Transfer Pricing / B E P S



G7 Finance Ministers commit timely, effective implementation of two-pillar solution; Welcome OECD report on Tax Co-operation for 21st century

G7 Finance Ministers and Central Bank Governors welcome OECD's report 'Tax Co-operation for the 21st Century' and expresses commitment to the timely and effective implementation of the two-pillar solution and extends its support to developing countries for its successful implementation.

The report takes into account the consequences of international tax developments over the last 10 years, including the adoption of the two-pillar solution to address the tax challenges arising from the digitalization of the economy for national tax administrations and provides recommendations to strengthen co-operation at the national tax administration level in the context of increasingly coordinated international rules. The G7 Finance Ministers requests the OECD to continue its work in this area and to report back on further developments.

The report 'Tax Co-operation for the 21st century' highlights the following:

(i) the corporate tax landscape and a need for simple, collaborative, and digital administration of common rules,

(ii) Secondly, the topics beyond corporate tax such as how the international information exchange architecture could evolve, with a view to improving timeliness through real-time data availability and incorporating compliance by design and

(iii) Lastly, the meaning of changing tax landscape for developing countries and how the G7 could lead advanced economies in assisting developing countries to implement the Two-Pillar Solution.

OECD releases fourth batch of TP country profiles for four new countries

The OECD has announced the release of the transfer pricing country profiles for additional four countries which increased the score of the participating countries to 73.

The four new countries to join hands in sharing TP profiles are **Egypt, Liberia, Saudi Arabia and Sri Lanka.**



Issue of the month

ADVANCE RULING

Introduction

The tax disputes in India take a very long time to resolve. A tax dispute, if taken to the highest court (Supreme court of India) may cumulatively take well over a decade. The advance ruling regime can significantly promote tax certainty. An advance ruling on the tax implication of a propose transaction is useful for non-resident as well as resident, as it resolve complex interface between domestic tax law and tax treaties for cross border transaction.

History

The scheme of advance ruling was introduced by the Finance Act, 1993 and chapter XIX-B was inserted, establishing an Authority for Advance Ruling ('AAR') to provide certainty and avoid litigation related to taxation of transaction that involved non-resident.

The scope of transaction on which an advance ruling can be sought from the AAR has been gradually enhanced so that now both resident and non-resident can seek advance ruling on any issue that has a substantial tax impact.

Advance Ruling

An Advance Ruling means written opinion or authoritative decision by an Authority empowered to render it with regard to the tax consequences of a transaction which have been undertaken or is proposed to be undertaken by non-resident or resident and such judgement may be related to any question of law/fact.

AAR TO BAR

Authority for Advance Rulings pronounces ruling on the application of the non-resident/residents and such ruling are binding:

- on the applicants who had sought it;
- in respect of the specific transaction in relation to which it was sought; and



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- on the Principal Commissioner or Commissioner in respect of the applicant and the said transaction.

AAR consist of:

- a chairman
- Vice chairman,
- revenue member and
- law members.

There are three benches of Authority. The principal bench consists of Chairman, one revenue member and one law member. The other benches consist of one Vice-Chairman, one revenue member and one law member each. A bench cannot function if the post of Chairman or Vice-Chairman is vacant.

As per section 245-O of the Act, a person is be appointed as the Chairman of AAR if he has been a judge of the Supreme Court, or the Chief Justice of a High Court or retired Judge of a High Court who has served in that capacity for at least seven years. Similarly, the persons eligible for appointment as Vice-Chairman are retired judges of a High Court. As per past experience, the posts of Chairman and Vice Chairman have remained vacant for a long time due to non-availability of eligible persons.

This has troubled the working of AAR and a large number of applications are pending since last many years. The Finance Act, 2021 had provided that the AAR shall cease to operate from August 30, 2021 and Board for Advance Ruling ('BAR') has been setup by the Central Government from September 1, 2021. The Cases pending before AAR in which no order

have been pronounced till September 1, 2021 shall be transferred to the BAR and shall be deemed to be made to the BAR.

Board of Advance Ruling

As per section 245-OB the Government shall constitute one or more BARs as may be necessary for giving advance ruling.

Accordingly, the Government has in exercise of such powers vide Notification No. 96/2021 dated 1.9.2021, constituted three BARs for the purpose of giving advance rulings.

Every BAR shall consist of two members, each being an officer not below the rank of Chief Commissioner, as may be nominated by the CBDT.

No proceeding before, or pronouncement of advance ruling by the BAR shall be questioned or shall be invalid on the ground merely of the existence of any vacancy or defect in the constitution of the BAR.

Applicant to the BAR

As per Section 245-N of the act the advance ruling can be obtained by the following persons:

- a) A Non-Resident;
- b) A Resident undertaken or propose to undertake a transaction with a non-resident can obtain advance ruling in respect of any question of law or fact in relation to the tax liability of the non-resident arising out of such transaction;

c) A resident who has undertaken or propose to undertake one or more transactions of value of ₹100 crore or more in total;

d) Resident or class of category of person notified by CG, until now only public sector undertaking has been notified by the CG;

e) A resident or non-resident, can obtain an advance ruling to decide whether an arrangement, which is proposed to be undertaken by such applicant, is an impermissible avoidance arrangements and may be subjected to General Anti Avoidance Rules or not.

Application for Advance Ruling to the BAR

As per Section 245Q the Application has to be made in Quadruplicate and should be accompanied by a fees of INR 10,000 or such higher fees as may be prescribed:

Applicant	Amount ('in INR')
(i) PSU	10,000
(ii) Other Applicant Amount of one or more transaction upto INR 100 crore	2 Lakhs
Amount of one or more transaction exceeding INR 100 crore but not exceeding INR 300 crore	5 Lakhs
Amount of one or more transaction exceeding INR 300 crore	10 Lakhs

The Application made can be withdrawn within 30 days from date of application.

The BAR can either allow or reject an application. However, the BAR shall not allow an application where the question raised in the application:

a) is already pending before any IT authority or Appellate Tribunal or any court (However, a resident falling within any class or category of persons as notified by the Government can seek advance ruling even if the question raised is pending before any IT authority or Appellate Tribunal);

b) involves determination of fair market value of any property;

c) relates to a transaction or issue which is designed prima facie for avoidance of income tax (except in case of a PSU or in the case of resident or a non-resident for determination of whether an arrangement proposed to be undertaken is an impermissible avoidance arrangement)

If the application is rejected, reason for such rejection shall be given in the order.

Ruling of BAR

The BAR shall pronounce its advance ruling within six month from the receipt of application.

A copy of advance ruling Pronounced shall be sent to the applicant and the PCIT/CIT.

Where the BAR finds out on the representation made to it by the PCIT/CIT or otherwise that an advance ruling pronounced has been obtained by the applicant by fraud or misrepresentation of fact, it shall by order, declare such ruling as void ab initio and the provisions of the Act would apply to the Applicant as if such advance ruling had never been made.

Appeal to High Court

The order of the BAR is not binding as it was in the case of AAR.

The applicant aggrieved by the ruling pronounced or order passed by BAR or the AO on directions of Principal Commissioner or Commissioner may appeal to the High Court against such ruling within sixty days from the date of communication of that ruling or order.

Provided that if the High Court is satisfied on an application made by the appellant that the appellant was prevented by sufficient cause from presenting the appeal within sixty days, it may grant further period of thirty days for filing such appeal.

Proposed Changes

As per recent changes CG has proposed to make BAR faceless for the purpose of imparting greater efficiency, transparency and accountability by:

- (i) optimizing utilization of the resources through economies of scale and functional specialization;
- (ii) Introducing a team based mechanism with dynamic jurisdiction.

Conclusion

As per the Act AAR was required to pronounce the advance ruling within 6 months. However, it became difficult to fill the post of Chairman due to unavailability of retired Judges of the Supreme Court or Chief

Justice of High court which ultimately led to substantial delay in disposal of application.

Due to the hampered functioning of AAR, the Government via Finance Act 2021, has replaced AAR with the BAR.

The Major difference in BAR from the AAR are highlighted below:

- (i) Constitution of BAR includes members of IT Department (i.e. officers who would be at least of the rank of Chief Commissioner and above)
- (ii) Order of the BAR would not be binding and the aggrieved party may file an appeal against the order of BAR to the High Court.

The Government has attempted to revive the alternate dispute resolution mechanism through introduction of the BAR. It is expected that through BAR, cases will be resolved in a timely manner and the burden on the tax authorities will be reduced. However, the order of the BAR would no longer be binding and can be appealed before the High court. This could potentially increase litigation.

Hence, the time will tell whether the concept change is a desirable step and whether it would be possible to approach the BAR or continue under the normal dispute resolution provisions under the Act.

Legal Corner



LEGAL CORNER

Assistant Commissioner of Income Tax VS GP Global Energy (P) Ltd

Facts of the case:

GP Global Energy Pvt. Ltd. ('Assessee /Company') operates as a power trading company. During the year under consideration ('i.e. AY 2012-13') the Assessee's case was selected for scrutiny. The order of the AO was passed on the basis of Assessee's submissions and TPO's order wherein the international transactions aggregated by the Assessee were accepted by the TPO.

However, later the rectification order u/s 154 was issued by the TPO and the transactions where the difference between the comparable transaction price and international transaction price was negative was not considered.

In view of the above, the Assessee filed an appeal before Ld. Commissioner of Income Tax (Appeals) ('CIT(A)') stating that the rectification order of the

TPO is not in consonance with the provisions of the Income Tax Act (i.e. section 154). The order of Ld. CIT(A) was adjudicated in favor of the Assessee wherein the AO/TPO were directed to consider the entire set of transactions.

Against the above judgement of CIT(A), an appeal was filed by the Revenue, before Hon'ble ITAT Delhi Bench.

Revenue's Contentions

- The Revenue challenged the order of the Ld. CIT(A) in directing the AO/TPO to consider entire set of transactions ignoring the provisions of section 92(3) of the Act and the facts recorder by the TPO in the rectification order.

The Assessee did not present itself before the ITAT, therefore, the ITAT disposed of the appeal on hearing



Assessee's Contentions

- Assessee had argued before Ld. CIT(A) that TPO had not considered the transaction where difference between comparable transaction price and international transaction price is negative.
- Further, it was contended by the Assessee that the TPO cannot disallow the aggregation of negative values when the same was allowed in the original order passed by him as the scope of rectification u/s 154 is limited.

Hon'ble ITAT

The Hon'ble ITAT on the above contention gave the following decisions:

- The Tribunal allowed CIT(A)'s direction to consider the entire set of transactions as has been done in the original order of the TPO since the scope of rectification u/s 154 by the TPO is very limited and the TPO cannot disallow the aggregation of negative values which was allowed in the original order by the TPO as the issue involves interpretation of law and is a debatable issue. Therefore, the same is beyond the scope of section 154.

Comments:

- Rectification under section 154 of the Act can be made in cases where evident mistake of facts or law has been committed by the officer passing the order and the same is apparent from the record. Therefore, rectification is not possible if the issue subject to rectification is debatable.
- Delhi Bench of the ITAT has reproduced the fact that the scope of rectification by AO/TPO is very limited in 154 of the Act. Hence, it does not extend to the issues which involve interpretation of law and are debatable.

Glossary



Act	Income Tax Act, 1961
A.Y.	Assessment Year
ALP	Arm's Length Price
AO	Assessing Officer
ACIT	Assistant Commissioner of Income Tax
BEPS	Base Erosion and Profit Shifting
BAR	Board of Advance Ruling
CBDT	Central Board of Direct Taxes
CIT	Commissioner of Income Tax
FY	Financial Year
IT	Income Tax
ITAT	Income tax Appellate Tribunal
ITO	Income Tax Officer
ITR	Income Tax Return
ITBA	Income Tax Business Application
MNE	Multinational Enterprises
MAP	Mutual Agreement Procedure
OECD	Organisation for Economic Co-operation and Development
PCIT	Principal Commissioner of Income Tax
PAN	Permanent Account Number
TDS	Tax Deducted at Source
TPO	Transfer Pricing Officer
SLP	Special Leave Petition
UK	United Kingdom
US	United States
VsV	Vivad se Vishwas

GET IN TOUCH

Do write us back your Feedback/Queries/Comments, if any at taxhelpdesk@llca.net

DELHI

A-16/9 & A-16/4, Vasant Vihar, New Delhi – 110 057.

+91-11-42591800, 42591818

delhi@llca.net

www.llca.net

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