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Article on

**CRITICAL ANALYSIS OF THE VIABILITY OF ADVANCE
PRICING AGREEMENTS IN INDIA**

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ABSTRACT

In this exponentially growing commercial era, controversies revolving around disputes between tax authorities and multinational companies have become prevalent. The dispute between the tax authority of the host country and MNCs alleging violation of transfer pricing norms has proved to be a major bottleneck in inviting foreign investments and the transfer of technology internationally. In pursuance to be in tune with the dynamic global commercial progress, the concept of the Advance Pricing Agreement was brought into existence in the Indian Taxation regime. The advent of Indian APA regulations is a silver lining for India's aggressive transfer pricing audit regime and could be a significant turning point in India's transfer pricing environment. The paper goes into the detailed historical background that led to the rise of APA programme in India, and thereafter makes a detailed analysis of the APA programme by looking into the concept and compliances of APA programme in the Indian taxation regime, the key benefits and efficacy of APA programme in India till date. The paper further provides for the way forward after looking into the practical challenges and the shortcomings of the APA framework. APA has been adopted by tax authorities across the globe to reduce the transfer pricing disputes and harmonising tax collection pertaining to international transactions. Indian advance pricing rules need to be in tune with the best global practices and in pursuance, effort should be made to make it more lucrative, brings more tax revenue and convenient for corporations which in turn would strengthen the foreign investment.

INTRODUCTION

In this rapidly rising commercial era, the controversies surrounding disputes between tax administrations and multinational corporations (MNC) have become prominent. The objections and the disagreements between the tax authority of the host country and the MNC's over alleged infringement of the transfer pricing (TP) regulations have manifested to be a significant constraint factor in encouraging foreign direct investments and international business transactions. In 2008, India had the 3rd largest number of transfer pricing pending disputes all across the globe as per EY's Tax Risk and Controversy Survey, 2008.¹ In order to lessen down the transfer pricing disputes and provide tax certainty among the taxpayers, the Indian Government, vide the Finance Act, 2012, introduced the Advance Pricing Agreement (hereinafter referred to as 'APA') programme into the Indian taxation regime.² The Indian Government introduced the APA programme to keep pace with the dynamic global commercial growth and economic progress. Advance Pricing Agreement is a dispute avoidance mechanism pertaining to transfer pricing in advance.³ It is an arrangement where the transfer price or the transfer pricing methodology to determine the ALP of an international inter-company covered transaction is mutually agreed upon by the tax authority and the assessee in advance.⁴ The advent of Indian APA regulations is a silver lining for India's aggressive transfer pricing audit regime and could be a significant turning point in India's transfer pricing environment. If implemented in a fair, positive, and pragmatic manner, it would not only lessen down the number of transfer pricing dispute litigations but would also create a conducive environment for business transactions and abridge the present trust deficit gap between the tax authority and taxpayers. Hence, the APA programme creates a win-win situation by providing benefits to both tax authorities and taxpayers.

¹ Nikhil Kumar, *India has 3rd largest number of transfer pricing cases: E&Y*, THE ECONOMIC TIMES (Aug. 20, 2008, 10.04 AM), <https://economictimes.indiatimes.com/wealth/personal-finance-news/india-has-3rd-largest-number-of-transfer-pricing-cases-ey/articleshow/15573440.cms>

² Avani Verma, *Advance Pricing Agreements in India: A Revolution in Taxation Law*, 3 CHRIST UNIVERSITY LAW JOURNAL 39, 41-42 (2014).

³ Dale Hill, *India Introduces Guidelines For Advance Pricing Arrangement Program*, MONDAQ (Oct 30, 2012, 10.04 AM), <https://www.mondaq.com/india/transfer-pricing/204024/india-introduces-guidelines-for-advance-pricing-arrangement-program>

⁴ *Supra note 2*, at 39

The paper traces the historical backdrop, inception, and evolution of the advance pricing agreement programme. It would discuss the various types of APA parties can enter into and the binding nature of such an agreement. The paper would further provide a brief discussion upon the procedural and compliance requirements for entering into an APA and further discuss the key benefits of APA. The paper furthered the current trend and effectiveness of APA through statistics. The paper would also point out the flaws in the present APA scheme and provide practical suggestions to improve it upon further.

RESEARCH POINTS

1. *What historical backdrop led to the evolution and rise of the APA Programme in India?*
2. *What is the concept of Transfer Pricing? Whether Transfer pricing is legal or illegal?*
3. *What is APA's, and what are the various types of APA's? What is the binding nature of an APA? What are the key advantages of an APA? What is the current trend and effectiveness of Advance Pricing Agreements?*
4. *What are the procedural and compliance requirements for entering into an Advance Pricing Agreement?*
5. *What are the shortcomings of the current APA framework in India? And what are the measures that can be adopted to curb out such shortcomings?*

RESEARCH METHODOLOGY

I have used the doctrinal research methodology to complete this research assignment. This methodology ensured that I had researched by analyzing all the relevant documents available as primary and secondary sources required in this field. The legislative provisions under the "Income Tax Act 1961", "Income Tax Rules, 1921", "The Finance Act, 2001" and the "The Finance Act, 2012" created a sensation in the society and was, therefore, an essential requirement to study and analyze it properly along with the judiciary decisions taken in this field.

CHAPTERIZATION

CHAPTER-I

HISTORICAL BACKDROP VIS-A-VIS THE RISE OF ADVANCE PRICING AGREEMENT PROGRAMME IN THE INDIAN REGIME

Before we go further into the topic and analyze the concept of Advance Pricing Agreements, it is imperative to understand the reason for its existence. On an overview, the very reason for the rise of APA's is the inadequacy of the present transfer pricing framework and the growing number of Transfer pricing disputes. And therefore, it is quite essential to dwell on the concept of Transfer pricing, the legality/ illegality of Transfer Pricing, the provisions, and its current inadequacy in the present Indian regime.

A. What is Transfer Pricing?

The OECD defines 'Transfer pricing' as the price that one enterprise charges its associated enterprises, located in other jurisdictions, for the transference of goods, products, intangibles, and services.⁵ In simple terminology, Transfer pricing is the pricing of intercompany transactions which take place between affiliated businesses. According to the IT department, transfer price essentially reflects the value of goods, products, intangibles, and services amongst the independent operating units of organizations.⁶ The Transfer Pricing Process assesses the income

⁵ SC Mishra, *Transfer Pricing in India*, TAX GURU (July 26, 2019 11.05 AM), <https://taxguru.in/income-tax/transfer-pricing-india.html>

⁶ *Transfer Pricing in India*, INCOME TAX DEPARTMENT (Oct 21 2004, 10.05 AM) <https://www.incometaxindia.gov.in/Pages/international-taxation/transfer-pricing.aspx>

amount level earned by both parties from such intra-group transactions. Since its commencement, Transfer pricing has arisen as the biggest sphere of taxation disputes for MNC's due to its manipulation to avoid and reduce their corporate tax liabilities across jurisdictions.⁷

B. Whether Transfer pricing is illegal or not?

Transfer pricing is not considered illegal in itself; however, the way corporations are deliberately manipulating it with corrupt and unfair practices is considered to be illegal.⁸ Unfair and corrupt practices such as deliberate mispricing in contravention to laws and regulations are not acceptable.⁹ Reducing or increasing prices through deliberate mispricing allowed the corporations to transfer profits outside the nation artificially.¹⁰ This allowed the companies to minimize and avoid their tax liabilities by taking benefit of the advantages of high tax and low tax jurisdictions.¹¹ This tax evasion exercise has affected and caused enormous revenue losses to India and several other tax nations.

C. An Analysis of the Transfer pricing provisions

To tackle the tax evasion practices by the MNC's over such intra-group corporate transactions, the ***Indian Transfer pricing regulations*** were introduced by the Government in the Finance Bill, 2001. The Finance Bill, 2001 substituted the earlier Section 92 of the Income Tax, 1961 with Sections 92 to 92F.¹² This regulation aims to adopt the Uniform and Universal transfer pricing guidelines laid down by the Organization for Economic Co-operation and Development (hereinafter referred to as OECD).¹³ This code permits the Indian Taxation Authorities to adjust

⁷ Karishma Phatarphekar, *Indian Advance Pricing Agreement Regime: The Game Change*, GRANT THORNTON LLP (May 21, 2012, 10.05 AM) http://gtw3.grantthornton.in/assets/Indian_APAs_Regime_The_Game_changer.pdf

⁸ Anurag Soan, *Transfer Pricing: The Law And Practice Of Advance Pricing Agreements (APA)*, ITAONLINE.ORG (Oct 13, 2013, 2.05 PM) https://itatonline.org/articles_new/transfer-pricing-the-law-and-practice-of-advance-pricing-agreements-apa/

⁹ *Ibid* at pg 5.

¹⁰ Suranjali Tandon & Devendra Damle, *An Analysis of Transfer Pricing Disputes in India* 45-46, (National Institute of Public Finance and Policy, Working Paper No. 266, 2019)

¹¹ *Ibid* at Pg 67.

¹² The Finance Act, 2001, No. 14, Acts of Parliament, 2001, §. 49.

¹³ *Transfer Pricing Guiding principles for MNC's and Tax Administrations*, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (Nov 14, 2001 11.06 AM), <https://www.oecd.org/tax/transfer-pricing/transfer-pricing-guidelines.htm>

the Indian party's taxable income if and when the authority believes that the exchange between the Indian and the foreign party isn't based on ALP¹⁴. The Amendment led to the insertion of the definitions of 'associated enterprise,' 'international transactions,' and 'Arm's Length Price.'

The newly inserted Section 92A defines the term "Associated Enterprise." It states that "*two or more enterprises will be considered as 'associated enterprises,' either if one of the enterprises directly or indirectly participates in the control, capital or management of the other enterprise located in other jurisdiction, or if the same individual is directly or indirectly engaged in the common management, capital or control of both the enterprises.*"¹⁵ Section 92A (2) specifies several parameters such as control through directorship, voting power, borrowings, equity shares, debt, loans, and mutual interests based upon which two enterprises may be regarded as 'Associated Enterprises.'¹⁶

Section 92B defines the term "International Transaction" as "*the transaction between two (or more) Associated Enterprises regarding the sale, purchase, lease or transfer of tangible or intangible property; deferred payments or receivables, provision of beneficial services or facilities; cost-contribution accommodations; lending/borrowing of funds; or any other transaction having an impact on the profits, earnings, losses or assets of such enterprises, where either or both the Associated Enterprises are non-residents.*"¹⁷ Section 92B (2) clarifies that if any transaction occurs between an Associated Enterprise and a 3rd person based upon previous determined arrangement/agreement, such transaction would be considered an "international transaction."¹⁸

Arm's length principle states that the transfer price applied or sought to be applied for a transaction between two associated enterprises needs to be identical with the transfer price sought to be applied for a transaction between two unrelated parties, under identical governing circumstances.¹⁹ Section 92F defines the term Arm's Length Price (ALP) as the "transfer price applied or sought to be applied in an exchange between parties other than associated enterprises,

¹⁴ *Supra note 13, at 15.*

¹⁵ The Income Tax Act, 1961, No. 43, Acts of Parliament, 1961, § 92A.

¹⁶ The Income Tax Act, 1961, No. 43, Acts of Parliament, 1961, § 92A(2).

¹⁷ The Income Tax Act, 1961, No. 43, Acts of Parliament, 1961, § 92B.

¹⁸ The Income Tax Act, 1961, No. 43, Acts of Parliament, 1961, § 92B(2).

¹⁹ V Sridharan, *Transfer Pricing in India Basic principles, major issues of dispute, and role of High Court, Conference for High Court Justices on Direct Taxes*, (National Academy Bhopal, Working Paper No. 272, 2019).

under identical circumstances.²⁰ Section 92C of the Income Tax Act, 1961 provides six methods for computing ALP and further states that the 'Most Appropriate Method' as determined under Rule 10C Income Tax Rules 1921 shall be applied to choose amongst those specified six methods to determine ALP.²¹

D. Inefficacy of the Indian Transfer Pricing regime: Rise of APA Programme in India

India witnessed a rise in the Transfer Pricing litigations from 21% in 2001-02 to 52% in 2007-08,²² without having any corresponding infrastructure to expedite such conflicts. In 2008, India had the 3rd largest number of transfer pricing pending disputes all across the globe as per EY's Tax Risk and Controversy Survey, 2008.²³ These statistics show the inadequacy and the implementation challenges faced by the Transfer Pricing legislation in India. According to ***Clause 4.7.3 of the United Nations Practical Manual on Transfer Pricing for Developing Nations 2017***, the Transfer Pricing legislation in a developing nation would face fewer implementation challenges if the taxation authorities are provided with discretionary administrative authorities.²⁴ However, in a developing nation such as India, corruption practices exist, significantly raising the compliance costs needlessly.²⁵ The Transfer Pricing legislation also fails to provide tax certainty to the MNC's. Hence, to reduce the transfer pricing disputes and provide tax certainty amongst the MNC's, the Indian Government, vide the Finance Act, 2012, introduced the Advance Pricing Agreement (hereinafter referred to as 'APA') programme into the Indian taxation regime.

The APA Programme was introduced in **2012** by the inculcation of **Section 92CC and Section 92CD** in the Income Tax Act, 1961 vide the **Finance Bill 2012**. The **CBDT** vide notification **no. 36/2012 [F. No. 133/5/2012-SO (TPL)]/SO 2005 (E), 30/08/2012** inserted **Rule 10F to 10T**

²⁰ The Income Tax Act, 1961, No. 43, Acts of Parliament, 1961, § 92F.

²¹ The Income Tax Act, 1961, No. 43, Acts of Parliament, 1961, § 92C.

²² Supra Note 8 at Pg. no 2

²³ Nikhil Gaur, *India has 3rd largest number of transfer pricing cases: E&Y*, THE ECONOMIC TIMES (Aug 20 2008, 10.04 AM), <https://economictimes.indiatimes.com/wealth/personal-finance-news/india-has-3rd-largest-number-of-transfer-pricing-cases-ey/articleshow/15573440.cms>

²⁴ *United Nation's Practical Manual on Transfer Pricing for Developing Countries*, Department of Economic & Social Affairs, 2013

²⁵ Supra note 13, at 18

and **Rule 44GA**, dealing with the APA Scheme and International Transactions respectively, in the Income Tax Rules, 1962 for the functioning of the APA programme in India.²⁶

CHAPTER-II

A. ADVANCE PRICING AGREEMENTS

Advance Pricing Agreement is an arrangement between the taxation authorities of one or more jurisdictions and the taxpayer for fixing/determining the transfer price of a possible future international intercompany transaction in advance applying the accepted transfer pricing method.²⁷ OCED under Clause 4.123 has defined ALP as "*a voluntary agreement entered into between the taxation authorities of one or more jurisdictions and the taxpayer, specifying, in advance of controlled transactions, the transfer price or the method of fixing ALP of a possible future international intercompany transaction for a specified time period.*" Once the parties enter into an Advance Pricing Agreement with respect to an International inter-company transaction, the ALP of such transaction, for the duration defined in the agreement, would only be determined according to the APA. The inherent principle behind an APA is to resolve existing and prospective transfer pricing disputes through a pragmatic, principled and harmonious way as an alternative to the conventional adversary system, create a tax certainty among the taxpayers, and increase the efficacy of the Tax-Administration. The Internal Revenue Service (IRS) defines an APA as "*an agreement between the taxpayer and the tax authorities of one or more jurisdictions for the determination of the ALP of such international inter-company transaction in advance for a specified time period.*"²⁸ APA's are inherently considered to supplement the conventional adversarial system to resolve the transfer pricing disputes, especially when such conventional mechanisms fail to perform.

²⁶ *Ministry of Finance Notifies Advance Price Agreement (APA) Scheme*, Ministry of Finance, Government of India. Notification no. 36/2012 [F. No. 133/5/2012-SO (TPL)]/SO 2005 (E), 30th August, 2012 <https://www.incometaxindia.gov.in/communications/notification/92011000000000180.pdf>.

²⁷ Jabiulla, *Advance pricing agreement in India: empirical evidence from corporate respondents*, 6 INTERNATIONAL JOURNAL OF ECONOMICS, COMMERCE AND RESEARCH (IJECR) 5, 16-17 (2016).

²⁸ Internal Revenue Code 2004, §2(4).

The Advance Pricing Agreements in India have been classified into 3 categories based upon the no. of parties entering into such agreement.

- i. **Unilateral APA**: It is an advance pricing agreement where there is an involvement of only one tax administration. Hence, there are only two parties to a Unilateral APA, i.e., the tax administration (CBDT) and the applicant. A unilateral APA doesn't involve tax authorities of any other nations.²⁹
- ii. **Bilateral APA**: It is an advance pricing agreement where there is an involvement of two tax administrations of two countries. Hence, there are three parties to a Bilateral APA, i.e., the applicant, CBDT, and the competent tax administration of the foreign nation. The involved parties negotiate amongst themselves and finally enter into a single mutual agreement.³⁰
- iii. **Multilateral APA**: It is an advance pricing agreement with more than two tax administrations of more than two countries. Hence, the applicant, CBDT, and every competent foreign tax administrations are the parties of a Multilateral APA. The involved parties negotiate amongst themselves and finally enter into a single mutual agreement.³¹

B. Binding nature and the legal effects of Advance Pricing Agreements

A Unilateral APA is binding upon only the CBDT and the applicant. A Unilateral APA does not bind any other foreign tax administration. All the three involved parties, who reached out to such a single negotiated mutual agreement, are legally bounded by a Bilateral APA. Similarly, a Multilateral APA is also legally binding upon all the involved parties to the agreement.

Section 92 CC (5) of the Income Tax Act 1961 states that an Advance Pricing Agreement has a legal binding effect upon the assessee who is a party to such APA with respect to the covered transactions and also is binding upon the Commissioner of Income Tax (CIT) as well as other

²⁹ Gopal Bageria, *Advance Pricing Agreements in India*, MONDAQ (May 07, 2014, 11.24 AM), <https://www.mondaq.com/india/tax-authorities/311740/advance-pricing-agreements#>

³⁰ *Ibid.*

³¹ *Ibid.*

Income Tax officials subordinated to him concerning the said assessee and the said exchange/transaction.³²

However, an APA loses its legal binding effect upon the assessee or the CIT in the following circumstances:

- i. If there has been a change in legal position or facts that affect the entered agreement,³³ or;
- ii. If the Board declares the agreement as *void ab initio*, upon finding that the agreement so entered into has been obtained by the taxpayer through fraudulent activities or factual misrepresentations,³⁴ or;
- iii. If the entered agreement has been terminated under Rule 10 R of the Income Tax Rules, 1962,³⁵ or;
- iv. If there has been any change in any of the critical assumptions, or if the assessee has failed to fulfill conditions subject to which the agreement was reached³⁶.

C. Procedural and compliance requirements to enter into an APA arrangement

Before dwelling further into the procedural compliances, the query of eligibility of entering into an APA irks. According to Rule 10G of the Income Tax Rules 1962, any individual who has entered into an international transaction or who contemplates to undertake an international transaction is considered eligible to apply for APA.³⁷ The Indian APA scheme has not adopted any pecuniary threshold, unlike other nations, within its eligibility criteria. It is pertinent to note that the APA mechanism is inapplicable for specified domestic controlled transactions.

³² The Income Tax Act, 1961, No. 43, Acts of Parliament, 1961, § 92CC (5)

³³ The Income Tax Act, 1961, No. 43, Acts of Parliament, 1961, § 92CC (6)

³⁴ The Income Tax Act, 1961, No. 43, Acts of Parliament, 1961, § 92CC (7)

³⁵ The Income Tax Rules, 1962, Rule 10R

³⁶ The Income Tax Rules, 1962, Rule 10M (4)

³⁷ The Income Tax Rules, 1962, Rule 10G

Rule 10L provides for the procedure of entering into an APA arrangement.³⁸ The prescribed procedure has been divided into four (4) stages/ phases:

The 1st phase is known as the "***Pre-Filing Consulting***" Phase. The parties hereby discuss the scope of the agreement, nature of the international transaction, suitability of the advance pricing agreement, and determines issues relating to Transfer Pricing. The Pre-Filing Consultation phase does not have any legal binding effect upon the parties.³⁹

If and when an assessee expresses his desire to apply for an advance pricing agreement with the tax administration(s) post-pre-filing consultation phase, such stage is called the "***Final Submission/ Formal APA Application***" phase. Hence, in this stage, the assessee files the formal APA application containing detailed information and the application filing fee in the recommended manner before the competent authority.⁴⁰

The 3rd stage is where the tax administrations and the assessee negotiates and mutually concludes regarding matters related to transfer pricing of the covered inter-group transactions. In this stage, the APA team also makes inquiries and discussions of matters considered material and necessary for the agreement. Based on such discussions and inquiries, the APA team prepares and submits a draft report before the competent authority. Hence, this phase is called the "***Discussion and Negotiation***" Phase.⁴¹

The next stage is called the "***Finalization of APA***" phase. In this phase, the competent authorities review and propose suggestions to be inculcated in the drafted APA. Once the proposed suggestions are instilled in the agreement, the document is then signed and executed by all the involved parties to finalize the advance pricing agreement and make it legally binding and effective.⁴²

³⁸ The Income Tax Rules, 1962, Rule 10L

³⁹ Himardri Singh, *Advance Pricing Agreements (APA) A welcome step in transfer pricing disputes*, NEERAJ BHAGAT & CO (Apr 06, 2016, 10.05AM), <https://neerajbhagat.com/pdf/Advance%20Pricing%20Agreements.pdf>

⁴⁰ *Ibid* at Pg 9

⁴¹ *Ibid* at Pg 9

⁴² *Ibid* at Pg 10

CHAPTER-III

AN ANALYSIS OF THE APA ARRANGEMENT

A. Key Advantages of Advance Pricing Agreements

The Advance Pricing Agreement was introduced to increase the efficacy of the Tax-Administration by resolving existing and prospective transfer pricing disputes through a pragmatic, principled and harmonious manner. Once the parties enter into an Advance Pricing Agreement with respect to an International inter-company transaction, then the ALP of such transaction, for the duration defined in the agreement, would only be determined pursuant to the APA. This provides tax certainties, definite and predictable policy regime amongst the taxpayers and investors. A Bilateral and Multilateral APA guarantees the elimination of potential double taxation risk arising out of a controlled transaction.⁴³ APA further lowers the compliance costs and administrative costs by eliminating transfer pricing audit risks.⁴⁴ APA allows free flow of information between the parties during the negotiation process for the determination of transfer pricing methodology, which is considered to be more of an objective and practical review of the involved issues.⁴⁵ For example, in the determination of the ALP, the parties may also consider an economic rationale instead of absolute commercial reasoning. It also creates a favorable conducive environment for international business transactions (FDI's) and abridges the present trust deficit gap between tax authorities and taxpayers. Hence, APAs create a win-win situation by providing benefits to both the tax authorities and taxpayers.

⁴³ Jabiulla, *Advance pricing agreement in India: empirical evidence from corporate respondents*, 6 International Journal of Economics, Commerce and Research (IJECR) 5, 16-17 (2016).

⁴⁴ *Ibid* at 13

⁴⁵ Karishma Phatarphekar, *Indian Advance Pricing Agreement Regime: The Game Change*, GRANT THORNTON LLP (May 21, 2012, 10.05 AM) http://gtw3.grantthornton.in/assets/Indian_APAs_The_Game_changer.pdf

B. Appreciation and Efficacy of Advance Pricing Agreements in Indian Regime

In India, 985 APA applications (Unilateral + Bi-lateral) were filed by the applicants between 2012-2018.⁴⁶ Further, around 271 advance pricing agreements were successfully entered into out of these 985 APA applications.⁴⁷ These stats testify that the APA programme in India seems to have been appreciated and overwhelmingly preferred by the taxpayers and tax authorities worldwide and further shows that the APA programme has matured and strengthened over the past few years in the Indian regime. The 271 signed APA's has yielded INR 100 billion and has provided tax certainty for 1800 years amongst the taxpayers.⁴⁸ It further disposed of 880 transfer pricing litigations/disputes which otherwise might have ended up in the Indian courts.⁴⁹ According to the CBDT report, the Indian tax administration now receives a tax payment of approximately INR 30 billion without getting into any conflict, dispute, or litigation.⁵⁰ This shows that the advance pricing agreements have managed to resolve critical transfer pricing problems and concerns that were susceptible to lengthy litigations and tax certainty amongst the taxpayers.

C. Practical Challenges and Shortcomings of the APA framework in India: The Way Forward

According to the CBDT Annual report 2017-18, there has been a dip of 28% in the number of advance pricing agreements entered in 2017-18 than APA's signed in the previous financial year.⁵¹ The report suggests that the average time to complete APA's in India has increased from 28months in the year 2016 to 32 months by the year 2017.⁵² The shortage and paucity of human

⁴⁶ Advance Pricing Agreement (APA) Programme of India - Annual Report (2017-18), Central Board of Direct Taxes August, 2018, <https://www.incometaxindia.gov.in/news/annual-report-2017-18-31-8-2018.pdf>

⁴⁷ *Ibid* at 17

⁴⁸ *Ibid* at 18

⁴⁹ *Ibid* at 33

⁵⁰ Ashwin Vishwanathan, *Advance pricing agreement: Certainty in uncertain times*, THE FINANCIAL EXPRESS (Dec 17, 2020, 10.05AM), <https://www.financialexpress.com/opinion/advance-pricing-agreement-certainty-in-uncertain-times/2151462/>

⁵¹ *Supra note* 49 at 22

⁵² Anushka Mitra, India's Second APA Annual Report Indicates INR 30 Billion Tax Recovery without Litigation, TAX SUTRA (Sept 03, 2018, 10.05 AM), <https://www.ibfd.org/sites/ibfd.org/files/content/pdf/Taxsutra-Indias-Second-APA-Annual-Report-Indicates-INR-30-Billion-Tax-Recovery-without-Litigation.pdf>

resources in the APA team have decelerated the processing of APA applications and brought down the number of signed agreements. Hence, the Indian Government needs to provide more human and physical resources for strengthening the APA structure and rationalize the steps involved to reduce the time taken to conclude an APA to attract more assessees.

The CBDT Annual Report 2017-18 further states that there has also been a dip in the number of APA applications filed in the year 2017-18.⁵³ Another study report shows that 32% of corporate and manufacturing sector applicants have found the procedural and compliance requirements of entering into an APA arrangement to be complex, complicated and cumbersome.⁵⁴ The scholars and researchers have argued that the whole cumbersome and complex procedure is filled with excessive bureaucracy and regulation compliance, providing the upper hand to the tax administrations and tax authorities.⁵⁵ This makes the process of negotiation very rigid. This is one reason for the dip in the number of APA applications filed and is considered another shortcoming of the current APA Indian framework. Hence, the tax administration shall minimize this excessive bureaucratic dominance approach by having more transparency in the negotiation process. APA negotiations need to be completed within the minimum possible timeframe.

International corporations have to reveal crucial secretive information such as pricing policies, revenue models, group policies, and trade secrets before the Indian tax authorities due to various compliance norms while entering into an APA arrangement.⁵⁶ A study report illustrates that 74% corporate sector respondent and 62% manufacturing sector respondent finds 'confidentiality' as a severe concern in the Indian APA framework.⁵⁷ This shows that Multinational corporations are hesitant to deal with the Indian tax administration due to the potential possibility of misuse of such revealed data and information in case it gets leaked. This is another reason for the dip in the number of APA applications filed and is considered another shortcoming of the current APA Indian framework. The Indian tax administration needs to deal with the taxpayers' information

⁵³ *Ibid*

⁵⁴ Jabiulla, *Advance pricing agreement in India: empirical evidence from corporate respondents*, 6 INTERNATIONAL JOURNAL OF ECONOMICS, COMMERCE AND RESEARCH (IJECR) 5, 16-17 (2016)

⁵⁵ R. Mukherjee, *India's advance pricing agreement programme: room for reform*, KLUWER INTERNATONAL TAX BLOG (Sept 24, 2019 11.05 AM)

⁵⁶ *Supra note 57*, at 12

⁵⁷ Asma Hussain, *A Critical Analysis of the Viability of Advance Pricing Agreement Regime –The Indian Experience*, SOCIAL SCIENCE RESEARCH NETWORK SSRN (May 30, 2020, 10.05 AM), <http://dx.doi.org/10.2139/ssrn.3706859>

diligently and shall provide utmost importance in securing the same. The Government should also streamline these sorts of compliance requirements.

The pivotal point of the entire framework is based upon the precise critical assumptions pertaining to the future economic circumstances in the determination of the transfer price. However, in cases of economic slowdown such as the COVID 19 pandemic or a situation where there has been a material change in the economic characterization of the assessee, any error might disturb the entire mechanism. Further, there will be additional hassles for both parties as the agreed methods in the APA might become redundant. Therefore, the APA arrangement needs to be implemented diligently.

The other practical challenge faced by the APA framework in India is the extortionate APA application filing fees. The report shows that 66% of applicants disagree with the current fee structure and finds the APA application filing fee unreasonably high.⁵⁸ This disincentivizes and restrains the global corporations from entering into APA. Hence, the Government needs to revisit it and rationalize the extortionate application filing fee.

CONCLUSION

The advent of the Indian APA programme is a silver lining for India's litigious transfer pricing audit regime. It could really be the major turning point in India's transfer pricing environment. It is considered a welcome move to provide tax certainties amongst the taxpayers and potential investors. Since its inception, the APA programme has matured and strengthened over the last 5-6 years in the Indian regime. Although the Indian APA structural framework is reasonably good and widely appreciated by the tax payers, potential investors, and the Indian tax administration, the aspects previously discussed need to be reformed. The proposed suggestions of the author could be undertaken through improved cooperation by the tax administrations in the drafting, implementation, and execution of the agreement. Taking a rational, realistic, and business-oriented approach by the tax administration would definitely attract more global corporate giants

⁵⁸ *Supra note 57*, at 12

to enter into an APA arrangement. This would create more employment opportunities and generate more wealth, thereby boosting the overall taxation economy. If implemented in a fair, positive, and pragmatic manner, it would lessen the number of transfer pricing dispute litigations and create a conducive environment for business transactions and abridge the present trust deficit gap between the tax authority and taxpayers.