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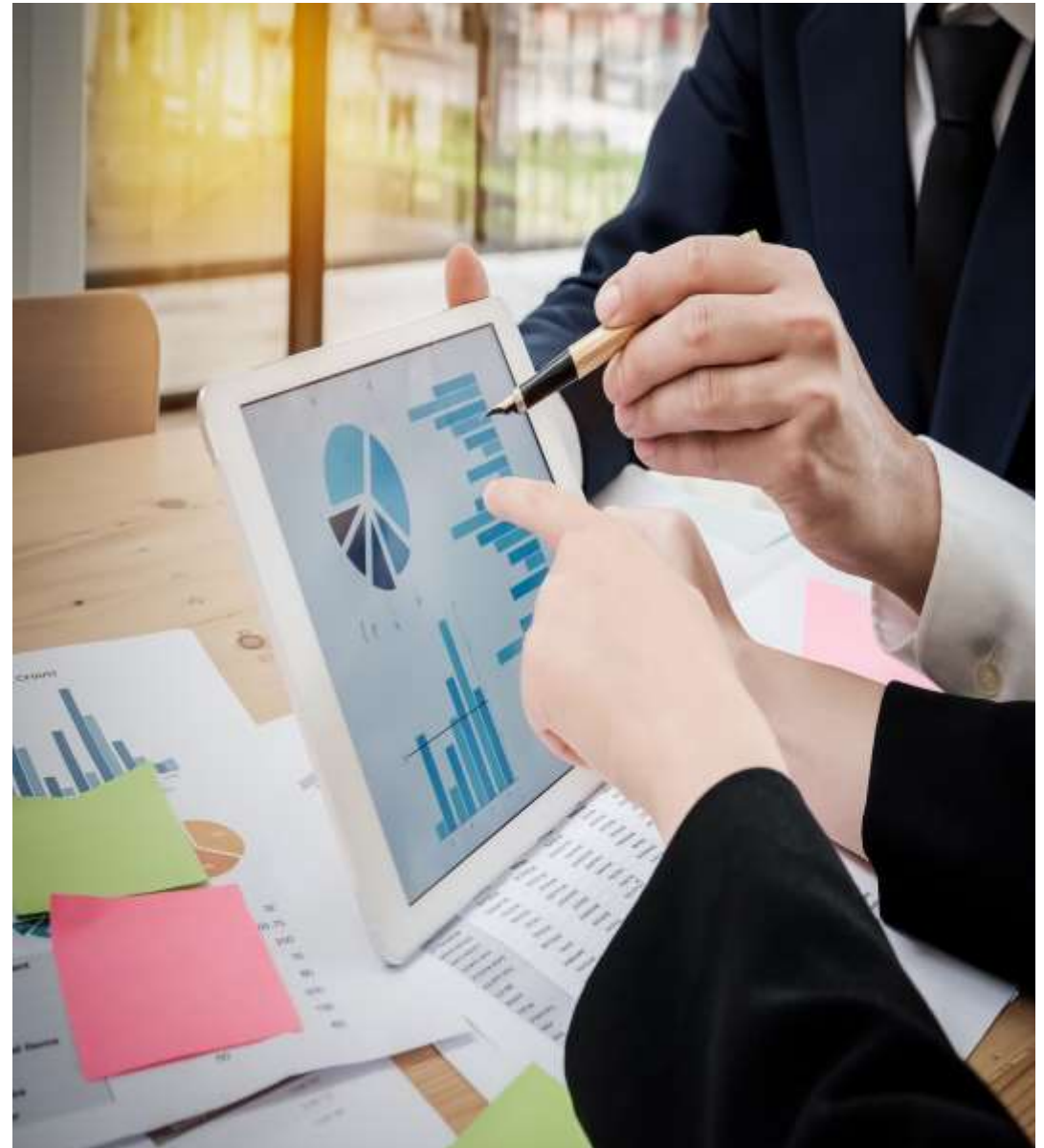
# Evolution of TP and Recent TP Controversy Issues in India

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# Contents

- Evolution of Transfer Pricing in India – Key amendments
- Recent Transfer Pricing Litigation Trends
- Opportunities and Offerings for Professionals in Transfer Pricing
- Questions & Answers

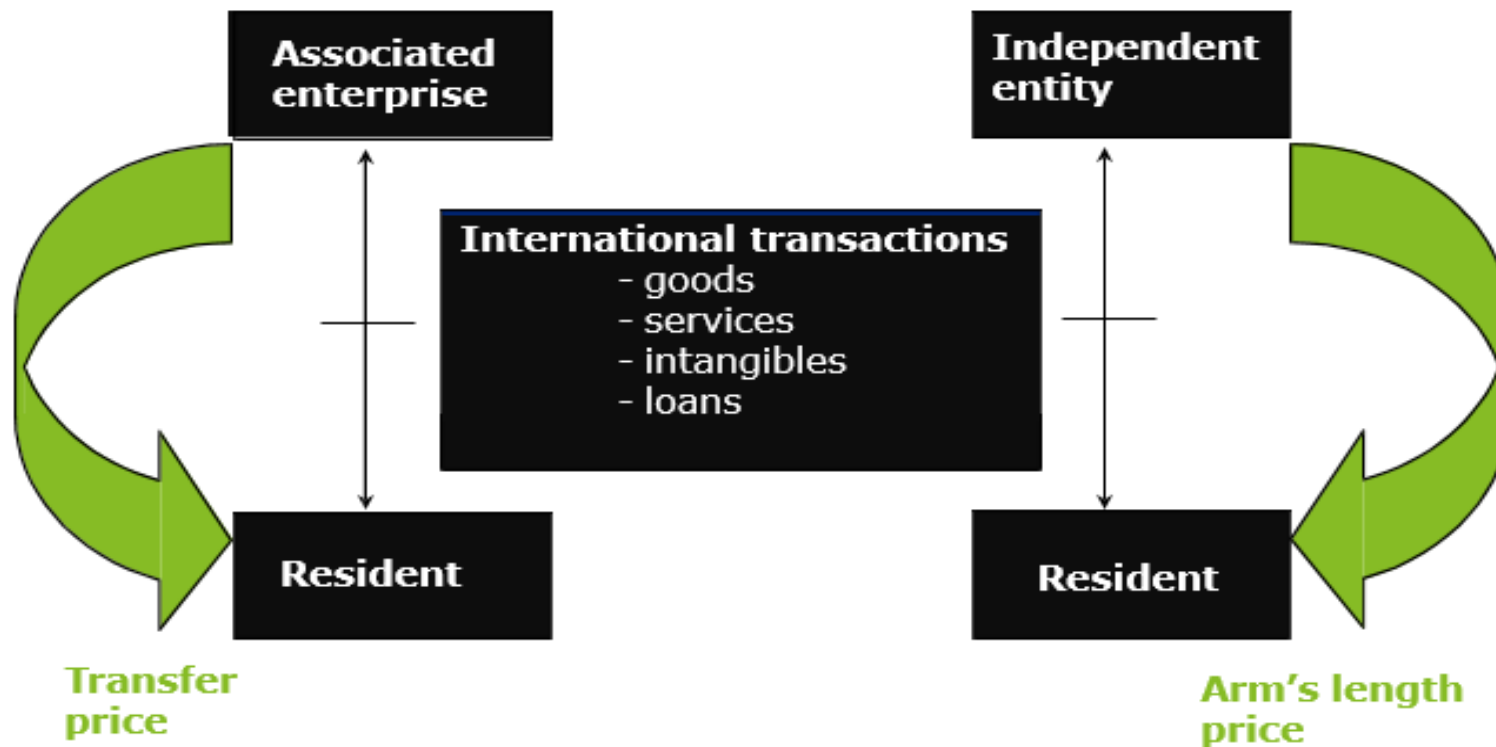




# Evolution of Transfer Pricing in India – Key amendments

# Concept of Transfer Pricing

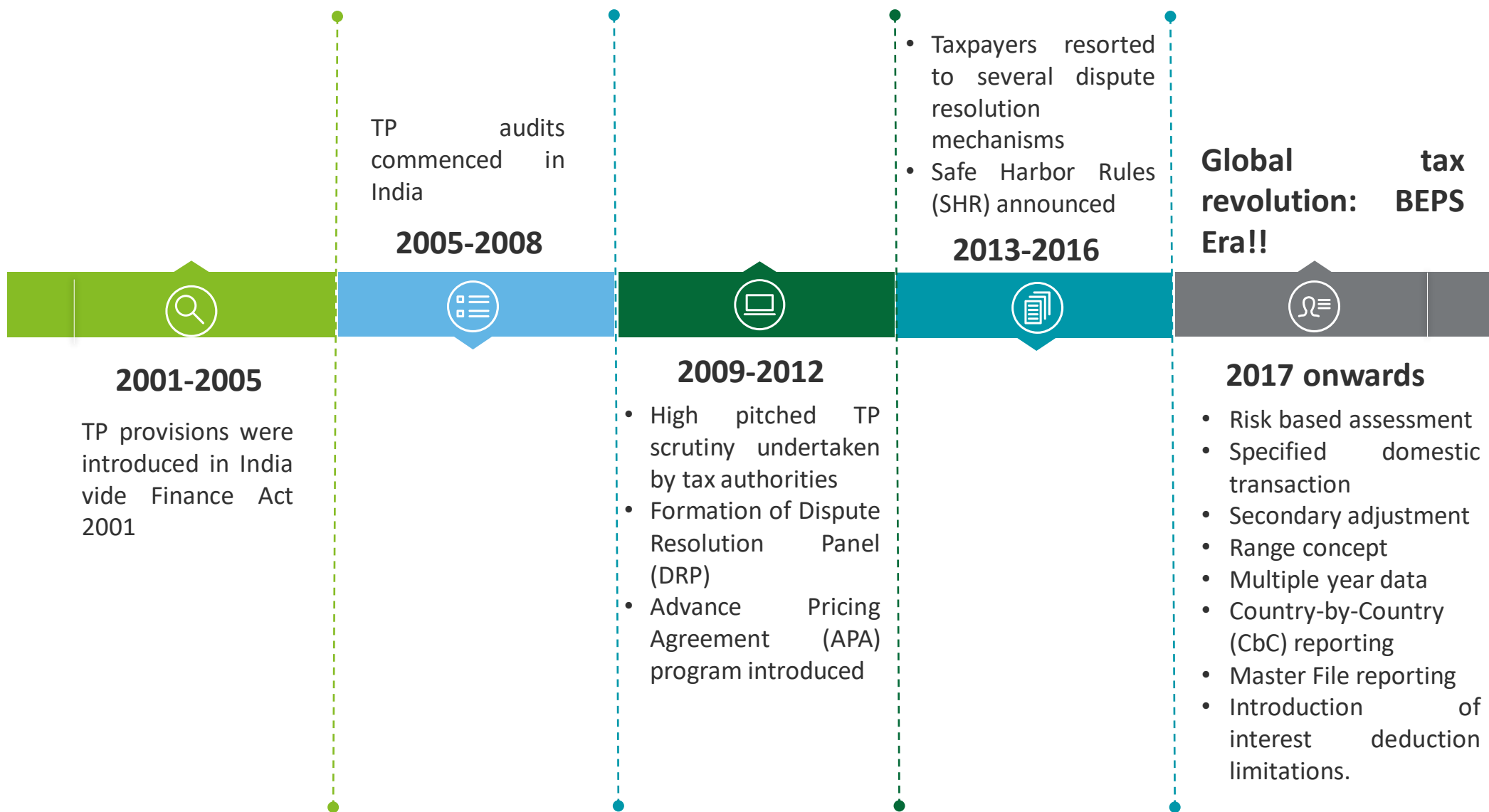
- Transfer Pricing refers to the pricing of international transactions / SDT between two associated enterprises.
- Due to special relationship between related parties, the transfer price may be different than the price that would have been agreed between unrelated parties.
- Provisions require demonstration of “transfer price” is at “arm’s length”



# Overview – India Transfer Pricing Regulations

Section & Rules	Provisions
92	Computation of income having regard to Arm's Length Price ("ALP")
92A, 92B and 92BA, 92F	Meaning of Associated Enterprise International Transaction and Specified Domestic Transactions and other definitions
92C (1) along with Rule 10A, 10AB, 10B and 10C	Methods of Computation of ALP
92CA	Reference to Transfer Pricing Officer (TPO) and TP Assessment Proceedings
92CB along with Rule 10TA to 10THD	Safe harbour rules
92CC and 92CD along with Rule 10F to 10T	Advance Pricing Agreement ("APA") and Effect to APA
92CE along with Rule 10CB	Secondary Adjustment ( <b><i>Introduced in Finance Act 2017</i></b> )
92D along with Rule 10D and 10DA	Maintenance of information and documents by persons entering into an international transaction or specified domestic transaction
92E along with Rule 10E	Accountant's Report in Form 3CEB entering into an international transaction or specified domestic transaction
286 alongwith Rule 10DB	Furnishing of Country-By-Country Report in respect of international group
270A, 271AA, 271BA, 271G	Penalty provisions

# Evolution of Transfer Pricing in India



# Introduction of Other Method



# Other method – An insight

- The "Other Method" was introduced in transfer pricing to provide flexibility for accurately determining arm's length prices in complex or unique transactions where traditional methods were inadequate.
- With the introduction of Rule 10AB(2), it was possible to use "any method" which takes into account
  - the price which has been charged or paid, or
  - would have been charged or paid for the same or similar uncontrolled transactions, with or between non-associated enterprises, under similar circumstances, considering all the relevant facts
- Other method can be used for following transactions:
  - Valuation of intangible property
  - Valuation of shares
  - Cost allocation
  - Reimbursements

## Data used for comparability purposes:



# **Introduction / amendments to Specified Domestic Transactions ("SDT")**

# Specified Domestic Transactions

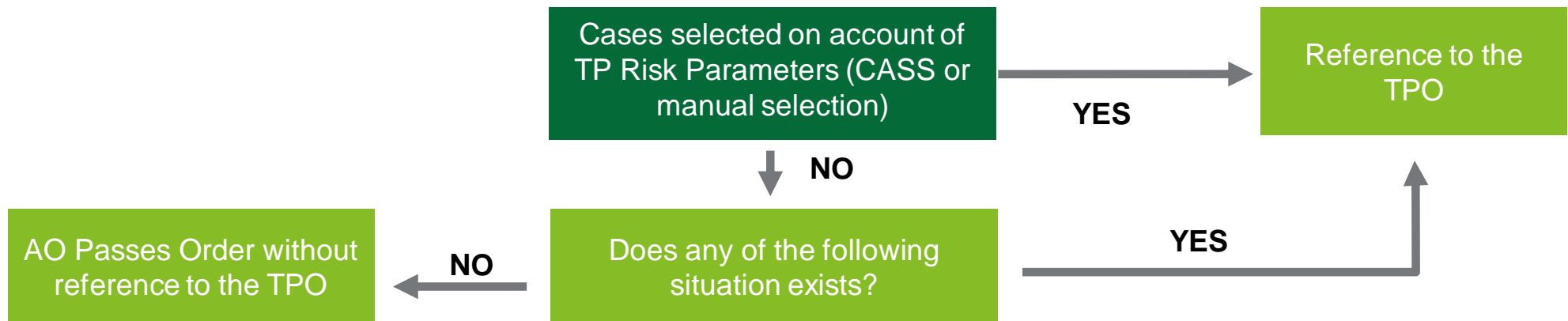
## Specified Domestic Transactions - Evolution

- Transfer Pricing was earlier limited to 'International Transactions'.
- The Finance Act 2012, extended the scope of Transfer Pricing provision to Specified Domestic Transactions ("SDT") vide section 92BA.
- The Specified Domestic Transactions as amended from time to time, include the following:
  - Tax Holiday / Deductions / Concessional Tax Rate claimed by the taxpayer
    - any transaction referred to in section 80A;
    - any transfer of goods or services referred to in sub-section (8) of section 80-IA;
    - any business transacted between the assessee and other person as referred to in sub-section (10) of section 80-IA;
    - any transaction referred to in any other section under chapter VI-A or section 10AA, to which provisions of sub-section (8) or sub-section (10) of section 80-IA are applicable;
    - any business transacted between the persons referred to in sub-section (6) of section 115BAB; or
    - Any other transactions as may be prescribed.
- Transfer Pricing provisions to apply to the 'above mentioned Specified Domestic Transactions' if the aggregate value exceeds INR **Twenty crores.**

# **Risk based transfer pricing audit procedure in India**

# Risk based transfer pricing audit procedure in India

The transfer pricing provisions came into force from Assessment year ("AY") 2002-03. Since the inception, the taxpayers were selected for TP assessment based on the value of international transactions. After completion of almost ten audit cycles, CBDT issued Instruction no. 15 of 2015, (October 2015) in which focus shifted to risk-based TP assessments with AO's continuing to being empowered to perform TP assessments. However, the risk-based TP assessment was further clarified in newly issued instruction 3/2016 dated 10.03.2016.



- Taxpayer has not filed Form 3CEB at all or has not disclosed all transactions (including those that come to the notice of the AO)
- Transfer pricing adjustment of INR. 10 Crore or more in an earlier AY and such adjustment has been upheld by the judicial authorities or is pending in appeal;
- Search and seizure or survey operations have been carried out and findings regarding TP issues have been recorded by the Investigation Wing or the AO
- Taxpayer has declared the international transactions or SDT in the Form 3CEB but has made certain qualifying remarks to the effect that the said transactions are not international transactions or SDT or they do not impact the income of the taxpayer.

- AO must record his satisfaction that there is an income or a potential of an income arising
- AO must provide an opportunity of being heard to the taxpayer before recording his satisfaction or otherwise

# Introduction of Secondary Adjustment

# Introduction of Secondary Adjustment – Section 92CE (1/2)

## Secondary Adjustment

- Secondary adjustments are made to remove the imbalance between cash account and actual profit of the taxpayer – in line with arm's length price
- Amount not repatriated by the Associated Enterprise on account of Secondary Adjustment within the prescribed period will attract tax on notional interest

## Applicability of Secondary Adjustment

Every taxpayer shall be required to carry out a secondary adjustment in case a primary adjustment to transfer price has been made:

- Suo-moto adjustment in the Return Of Income;
- Adjusted by the revenue authorities and accepted by the taxpayer;
- Concluded by way of an APA or MAP; or
- As per the Safe Harbor Rules.

## Exceptions to the provisions:

1. Amount of primary adjustment does not exceed INR 10 million; and
2. Primary adjustment is made in relation to any Financial Year (FY) prior to 01 April 2016

# Introduction of Secondary Adjustment – Section 92CE (1/2)

The excess money available with the AE consequent to the primary adjustment, if not repatriated to India within the prescribed time, shall be deemed to be an advance made by the taxpayer

## ⑩ Prescribed time limit for repatriation:

- In case of primary adjustment made by the Assessing Officer – within 90 days of the date of order.
- In case of primary adjustment made in general other cases– within 90 days of due date of filing of tax return.
- In case of APA entered into after the due date of filing ROI or resolution arrived by way of MAP – within 90 days from the end of the month in which APA is entered into / within 90 days from the date of giving effect to resolution by the assessing officer.

## Imputed per annum interest income on excess money which is not repatriated within the time limit

- Rupee denominated international transaction - One-year marginal cost of fund lending rate of SBI prevalent as on April 1st of the relevant previous year plus 325 basis points.
- Foreign currency denominated international transaction – **6 month LIBOR** as on September 30th of the relevant previous year plus **300 basis points**.
- However, in case the excess money is not repatriated within the prescribed time, the assessee has the option to pay additional income tax at the rate of **18 percent** on such excess money or part thereof, as the case maybe, following which no secondary adjustment would be undertaken.
- Further, this additional payment of tax shall be treated as final payment of tax, in respect of which no credit / deduction shall be allowed under any provision of the Income Tax Act.



# Application of Range and Multiple Year Data

# Application of Range and multiple year data

- Earlier, the arm's length price was calculated using **single year data** and computing **Arithmetic Mean of the comparable companies**.
- However, on 19 October 2015, the **CBDT published a notification releasing final rules for the usage of range and multiple year data** in order to **align transfer pricing practices followed in the developed economies**.

Number of comparables	CUP Method	RPM	CPM	TNMM	PSM	Other Method
1*	Single Price / Margin – Arithmetic Mean & Range <b>not</b> applicable					
2 to 5*	Arithmetic Mean					
6 or more	Range Applicable (35 <sup>th</sup> to 65 <sup>th</sup> Percentile)				Arithmetic Mean	

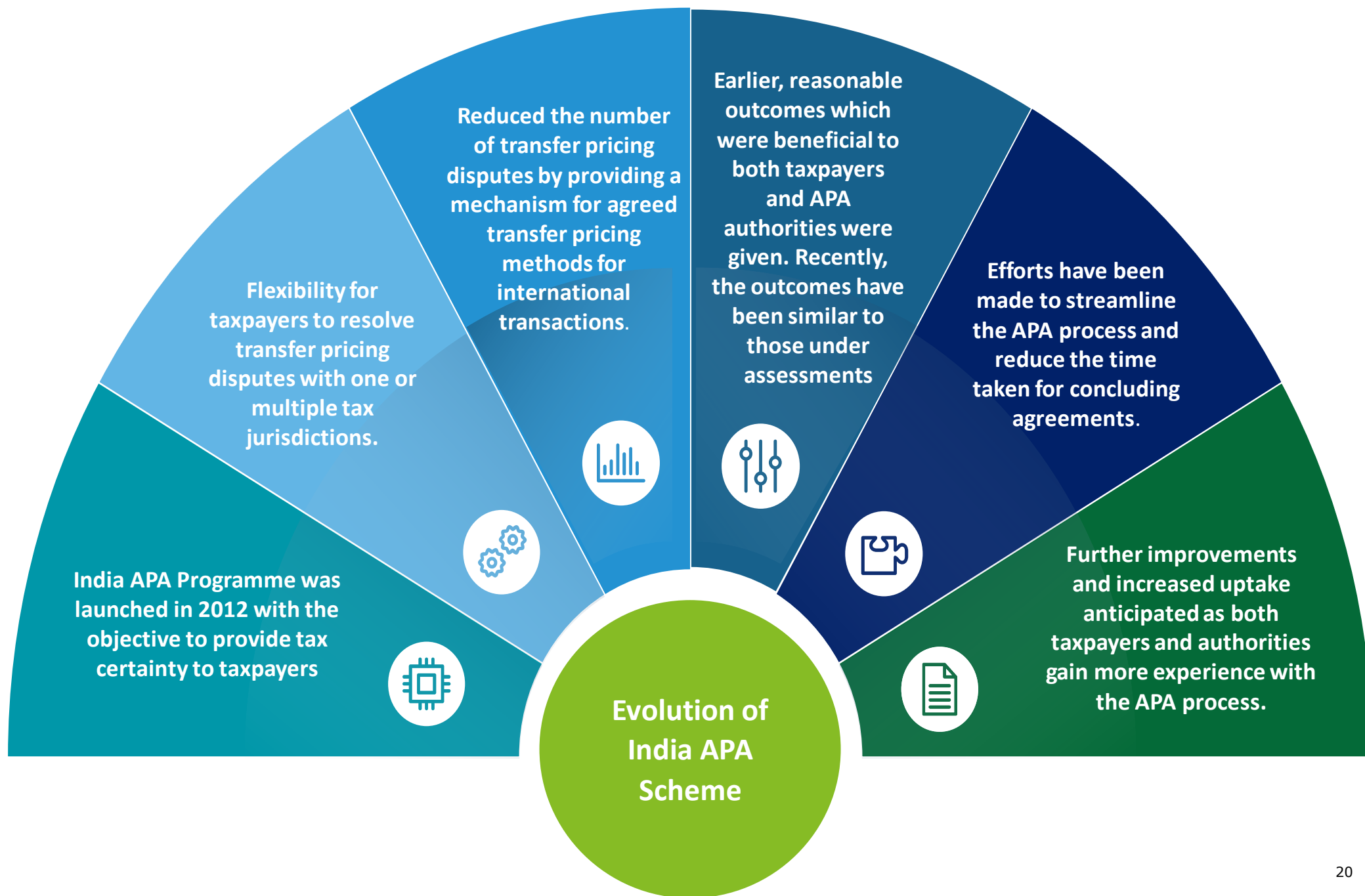
\*provided that the ALP so determined and the price at which the international transaction or SDT has actually been undertaken does not exceed **3 percent** of the latter, then the actual price shall be deemed to be the ALP. This benefit of +/- 3 percent range is available as per second proviso to section 92C(2).

## Applicability based on methods:

Methods	Applicability of Range	Applicability of Multiple year data
CUP	✓	✗
CPM	✓	✓
RPM	✓	✓
PSM	✗	✗
TNMM	✓	✓
Other Method	✗	✗

# Evolution of APA and MAP

# India APA Scheme - Evolution

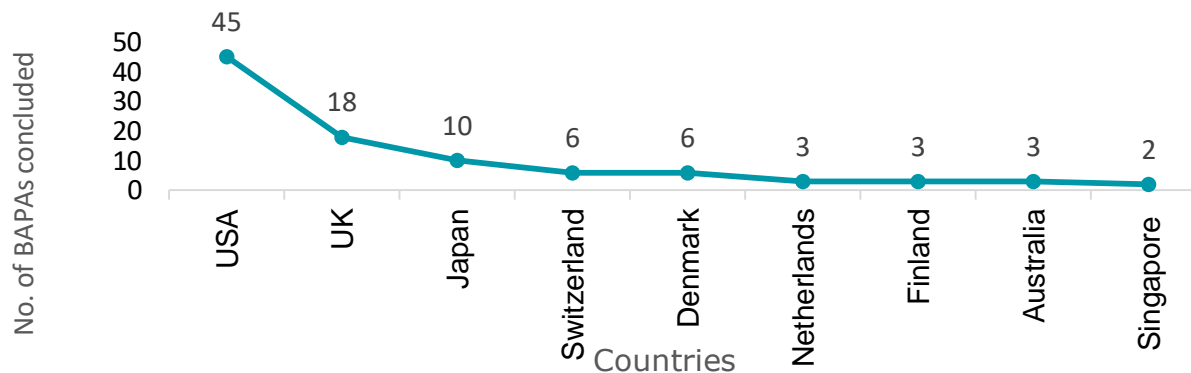
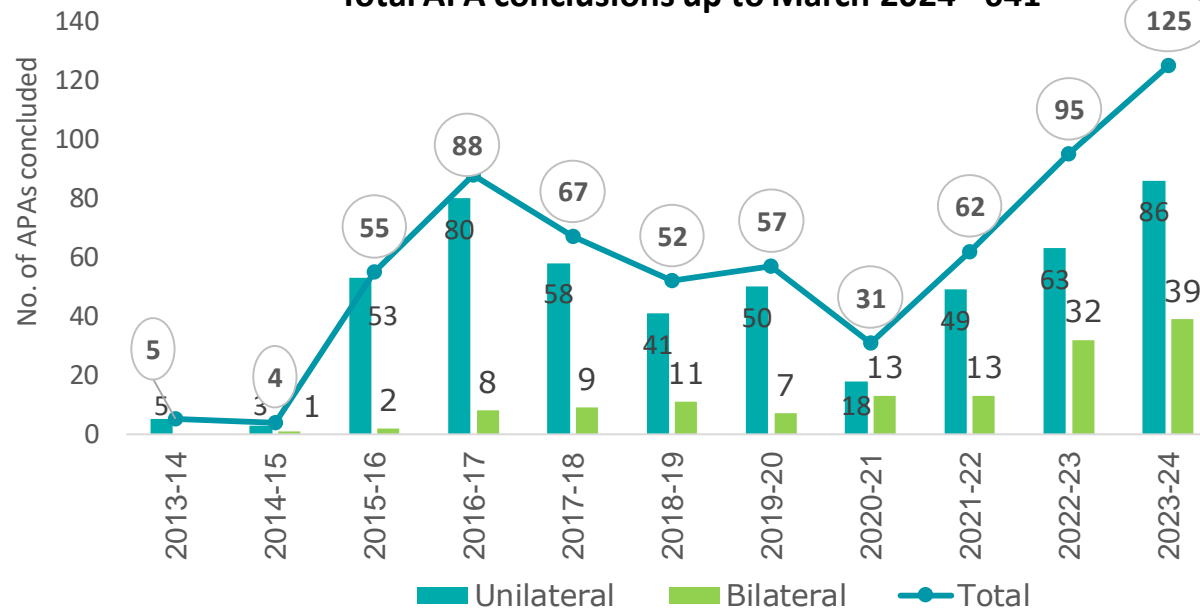


# India APA Scheme - APA Conclusion



Total 641 - 506 Unilateral & 135 Bilateral APA concluded up to March 2024

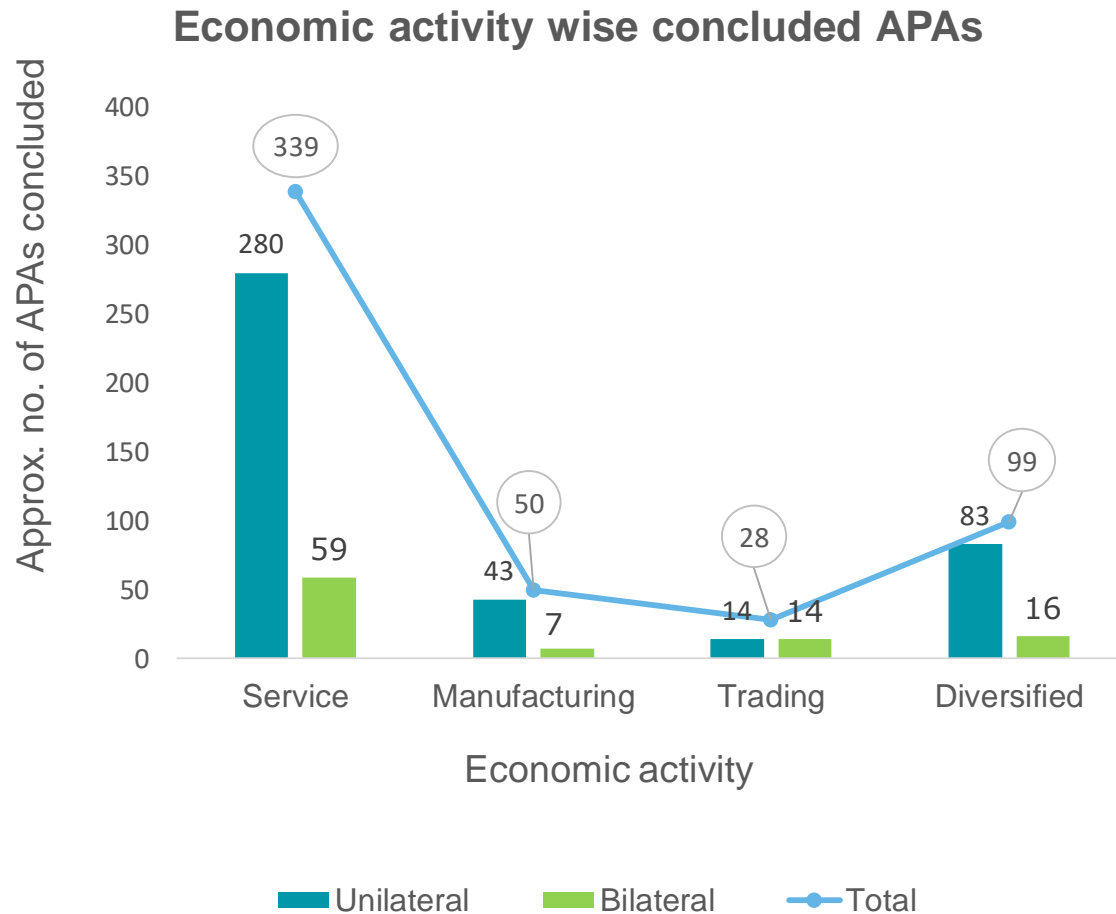
Total APA conclusions up to March 2024 - 641



- FYE March 2024 saw Bilateral APAs being signed with a new treaty partner namely Canada.
- FYE March 2024 has been a record-breaking year for India with 125 APAs concluded in FYE March 2024, the maximum number of APAs concluded in any single year since the launch of the APA program.
- Indian government targets to conclude many more APAs per year going forward.
- APA program has played a significant role in reducing tax litigation. APAs concluded till March 2023, has cumulatively brought about certainty for over 3200 tax years that means certainty from tax litigation for almost 3200 cases.
- So far, India has negotiated and concluded bilateral APA cases with 10 countries that include the US, the UK, Japan, Switzerland, Sweden, Singapore, Finland, the Netherlands, and Australia and Canada.
- Maximum number of APAs have been concluded with the US in last four years.

Majority of the bilateral APAs are concluded with USA, UK and Japan

# Concluded APAs – Economic activity covered in concluded APAs

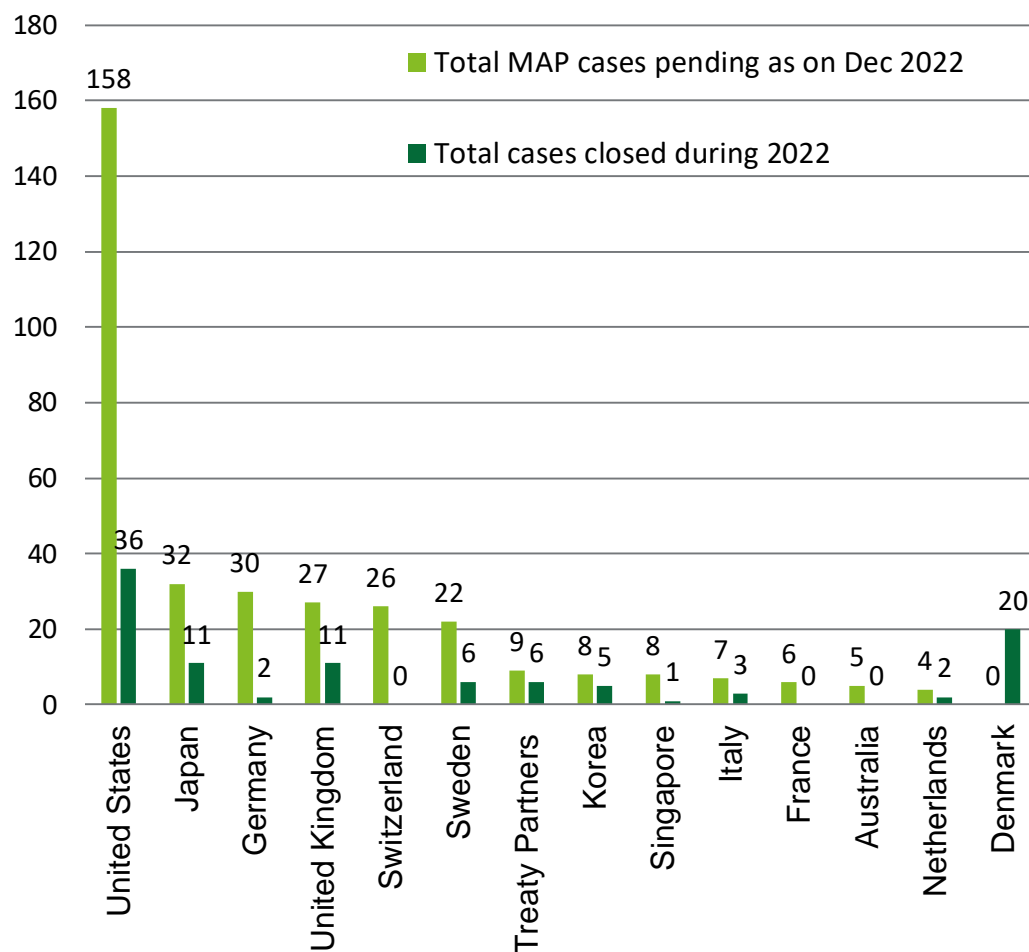


Economic activity	Unilateral	Bilateral	Total
Service	67%	61%	66%
Manufacturing	10%	7%	10%
Trading	3%	15%	5%
Diversified	20%	17%	19%
<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

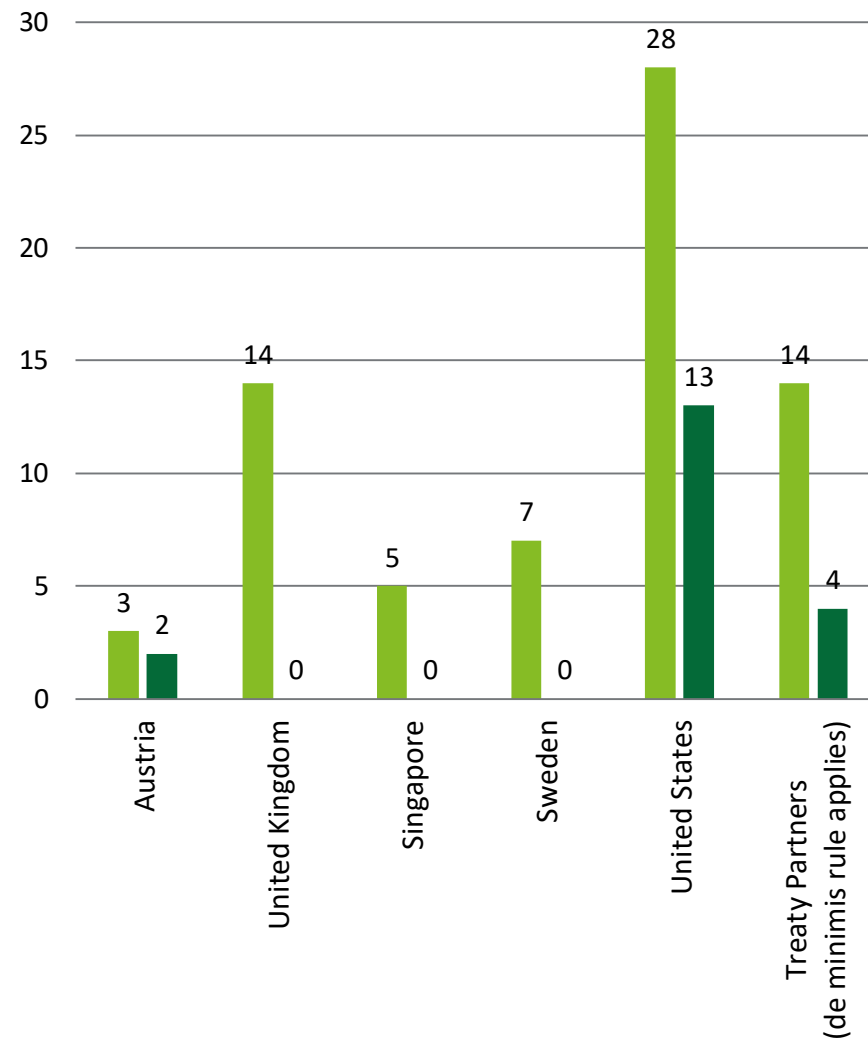
**Most applications which culminated into agreement pertain to the service sector. A majority of these, in turn, are captive companies involved in software development and Business Process Outsourcing (BPO). Some of these companies are also involved in engineering design services, R&D services, and Knowledge Process Outsourcing (KPO)**

# India MAP inventory and resolutions: country wise\*

## TP cases



## Other treaty cases



\* Data available for MAP cases filed after January 1, 2016 and up to 31<sup>st</sup> December 2022

# Recent APA and MAP Updates



CBDT vide its notification no. 01/2024, dated 26<sup>th</sup> Feb 2024 (Notification) has provided for the electronic filing of the applications for APA, MAP and Safe harbor.



CBDT has signed a record 125 Advance Pricing Agreements (APAs) in FY 2023-24. This includes 86 Unilateral APAs (UAPAs) and 39 Bilateral APAs (BAPAs)



New Framework Agreement on MAP



Standard BAPA template agreed by India and US Competent Authority for cost plus entities in India rendering services to their US parents



Introduction of pre-filing memorandum review by US APMA for APA



Joint Site Visits and frequent discussions between the India-US Competent Authority's for speedy resolution



A Third Commissioner, APA in Gurgaon was set-up for handling huge inventory of pending BAPAs





# Recent Transfer Pricing Litigation Trends

# Transfer Pricing Litigation - Trends

## CONTINUING

- Selection of most appropriate method
- Selection of comparables
- Selection of tested party - typically Indian entity preferred by the authorities
- Comparability/ economic adjustments
- Computation of mark-up, treatment of foreign exchange, provisions etc.
- Net margin or gross margin to be the point of analysis for distributors

## RECENT

- Marketing service provider considered as distributor
- Financial transactions including guarantees, inter-company loans
- Treatment of R&D services/ mark-up for service providers
- Marketing intangibles - AMP issue
- Management services, payment of royalty
- Imputation of interest on outstanding balances

## FUTURE

- Development of intangibles and ownership
- Secondary adjustments
- Business process restructuring
- Push towards profit split
- BEPS related issues

# Key TP Issues for Indian Manufacturers



Royalty pay-outs



Marketing intangibles



Economic adjustments – capacity utilisation, working capital, depreciation and risk adjustments for captive entities



Aggregation v/s Segregation



Comparability analysis for contract manufacturers



Use of CUP over TNMM – considerations for quality, shelf life etc.

# Key TP Issues for Distributors



Advertising Marketing and Promotion Intangibles ('AMP')



Start-up losses



Use of Berry ratio



Resale Price Method vs Transactional Net Margin Method



Transfer Pricing Model for Marketing Support Service Providers – Return on Sales vs Commission on sales vs Cost Plus margin

# Key TP Issues for Service Industry



Issue of characterisation - KPO vs. BPO



Management services



Contract R&D



Other TP issues



# Opportunities and Offerings for Professionals in Transfer Pricing

# Opportunities and Offerings for Professionals in Transfer Pricing

## Opportunities

- **Linked to business**
  - ✓ Aligning transfer pricing strategies with overall business objectives.
  - ✓ Enhancing profitability and operational efficiency through effective transfer pricing.
- **Interpretation of Tax Laws:**
  - ✓ Advising on local and international transfer pricing regulations.
  - ✓ Ensuring compliance with OECD guidelines and BEPS initiatives.
- **Field for Diverse Professionals:**
  - ✓ Involves Chartered Accountants (CAs), MBAs, Economists, and Lawyers etc.
- **Dispute Resolution:**
  - ✓ Managing disputes between tax authorities and multinational corporations.
  - ✓ Providing expert testimony and litigation support.

## Offerings

- **Compliance**
  - ✓ Accountant's Report in Form 3CEB
  - ✓ TP Documentation;
  - ✓ Master file / CbCR;
- **Advisory**
  - ✓ Advisory on business re-structuring, business modelling (Example: Exit Charge, Price Setting etc.);
  - ✓ Inter-company transactions policy drafting / reviews, benchmarking analysis etc.
- **Litigation**
  - ✓ TP Assessment / DRP / CIT(A) / ITAT / HC and SC
  - ✓ APA / MAP / Safe Harbor etc.



Q & A



**Thank you !**