

CBDT provides clarifications on APA rollback provisions

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In brief

Provisions relating to Advance Pricing Agreements (APAs) were introduced in the Indian Income-tax Act, 1961 (the Act) with effect from 1 July 2012, *vide* Finance Act, 2012. These provisions did not then include rollback provisions. The provision to provide for a rollback mechanism was brought into the Act *vide* Finance Act 2014 with effect from 1 October 2014. Thereafter, in March 2015, the Central Board of Direct Taxes (CBDT) announced detailed rules explaining the rollback provisions and the procedure for giving effect to them (the Rules).

Subsequent to the Rules being notified, the CBDT received several requests for clarifications regarding certain matters. To address these, the CBDT has now issued clarifications in a Question and Answer format.

In detail

The clarifications provided by CBDT are as follows:

1. Rollback provisions will be available even in case of revised return of income (ROI or return) filed under section 139(5) of the Act, because the revised return replaces the original return. However, rollback provisions will not be available for a return filed under section 139(4) of the Act, because it is a return not filed within the specified due date.
2. As per the Rules, rollback provisions were to apply to the “same” international transaction to which the APA applies. It has been clarified that “same” implies same nature of transaction, and undertaken with the same associated enterprise (AE). Also, the underlying FAR

(functions, assets and risks) of the transaction should not be “materially” different, i.e., there should not be a material change in underlying facts and circumstances which could have resulted in an APA with significantly different terms and conditions.

3. An applicant has to choose all the 4 years for rollback, unless: (a) the relevant international transaction was not undertaken in any of the four years; or (b) the applicant fails the prescribed rollback conditions in any of the 4 years. In such cases, the Applicant can still apply for rollback for other rollback years.

(Observation: While clarifying, the CBDT has stated that the international transaction should be undertaken with the same AE. However, it

may be possible that the same international transaction may, for a variety of reasons, is now undertaken with a different AE. This should not be the reason for prohibiting the international transaction from applicability of the rollback provisions; so long as the international transaction is same. It may be imperative to note that relevant Rule only refers to the “same international transaction” and not to the “same AE”.)

4. Rollback provisions shall not be available in case a Tribunal has decided the matter on arm’s length price (ALP) determination of an international transaction for which rollback has been applied, unless the matter has been set aside by the Tribunal for fresh consideration by

lower authorities with full discretion at their disposal.

(Observation: This would imply that even in cases where a Tribunal has disposed of a matter by providing directions to lower authorities for deciding on the matter, rollback provisions would not be available because of the lack of “full discretion” available to the lower authorities.)

5. Rollback provisions would be available where the application of rollback is effected in a manner such that the returned income or loss does not reduce or increase, respectively, i.e., the rollback benefit would be limited to the extent of declared income, and not beyond. For example, if the returned income is INR 100, the income after transfer pricing adjustment is INR 120, and the application of the rollback provisions results in reducing the income to INR 90, then the rollback for that year would be determined in a manner that the declared income INR 100 would be treated as the final income for that year.
6. If rollback provisions are not given effect to in accordance with the prescribed rules, then the entire APA agreement would stand cancelled.

(Observation: Although the requirements for giving effect to the rollback provisions are largely procedural, applicants need to exercise great caution in this regard as failure to do so would jeopardise their entire APA agreement.)

7. If MAP has been concluded for any rollback year for a particular international transaction, then rollback provisions would not be

available for that particular international transaction in that particular year.

However, if MAP is pending for any rollback year, then, at the option of the applicant, either MAP or rollback application can be proceeded with for that year.

8. ALP could be different for different years – however, the manner of determining ALP as per the rollback provision would need to be the same as that agreed in the APA (e.g., choice of method, comparability analysis and tested party).
9. ALP for rollback years would be agreed after full examination of facts, including validating critical assumptions. Accordingly, compliance audit for rollback years would be required to check if the agreed price or methodology has been applied in the modified return of income.
10. An applicant can withdraw its rollback application, and still maintain the APA application for future years. However, it cannot accept the rollback results without accepting the APA for future years. In case of withdrawal, the fee for filing rollback application shall not be refunded.
11. Already concluded APAs (i.e., finalised before 14 March 2015) may be revised to include rollback provisions.
12. For already concluded APAs, the time to file the modified return of income for all rollback years shall start from the date of signing the revised APA incorporating the rollback provisions.
13. In case of a merger or demerger, only the entity which has applied for an APA, or entered into one, would be

eligible for rollback provisions. For example:

- a. If A, B and C merge to form C and C is the APA applicant, then only C would be eligible for rollback provisions – while A and B would not be.
- b. If A and B merge to form new company C, and C files an APA application, then neither A nor B would be eligible for rollback provisions.
- c. If A has applied for or entered into an APA, and subsequently demerges into A and B, then only A will be eligible for rollback provisions, as B was anyway not in existence during the rollback years.

The takeaways

Within three months of announcing the Rules and receiving subsequent requests for clarifications, the Government has issued the much needed answers sought to various questions. The responsiveness of the Government in providing clarity to taxpayers is undoubtedly laudable. The clarifications issued are apparently quite clear, crisp and accord reasonable flexibility to the Rules. Needless to say, the clarity provided will go a long way in deterring disputes.

Although ambiguities on several aspects have been purged, yet there remain some open areas which would be worthwhile for the APA authorities to duly consider when reviewing APA/rollback applications or during negotiations:

- Despite clarifying that rollback provisions shall not be available when a Tribunal has decided the matter, unless it has been set aside

for fresh consideration by lower authorities, it is still not clear whether rollback provisions would be available in case a Tribunal order is contested by the taxpayer or Revenue before the High Court. It appears from a conjoint reading of the Rules that rollback provisions would be available in such cases.

- One of the pre-conditions for being eligible for rollback provisions is that the international transaction for which rollback is being applied should have been reported in Form 3CEB by the due date. Given the expansive powers of the Transfer Pricing Officer under section 92CA subsections (2A) and (2B) to examine even those

transactions which have not been reported – it may have been worthwhile for the CBDT to clarify that even if the transaction is not reported in Form 3CEB, the taxpayer would be eligible for rollback.

Further, although not expressly clarified, it is expected that resolution of rollback applications could have a persuasive value on the stay of demand petitions filed before Tribunals and any other appellate authorities in respect of any of the rollback years. It is also expected that penalty provisions would be judiciously applied when an APA and a rollback is negotiated with the Government.

To conclude, it will be fair to state that with the introduction of rollback provisions, the prescription of rollback rules, and

the fast-paced subsequent issue of clarifications, the Government has taken a positive leap towards meeting its stated "on-ground" objectives of building trust, enhancing taxpayer confidence and providing taxpayer with sought after certainty.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact:

Tax & Regulatory Services – Transfer Pricing

Gautam Mehra, *Mumbai*
+91-22 6689 1155
gautam.mehra@in.pwc.com

Indraneel R Chaudhury, *Bangalore*
+91-80 4079 6064
indraneel.r.chaudhury@in.pwc.com

Our Offices

Ahmedabad

President Plaza
1st Floor Plot No 36
Opp Muktidham Derasar
Thaltej Cross Road, SG Highway
Ahmedabad, Gujarat 380054
+91-79 3091 7000

Bangalore

6th Floor
Millenia Tower 'D'
1 & 2, Murphy Road, Ulsoor,
Bangalore 560 008
Phone +91-80 4079 7000

Chennai

8th Floor
Prestige Palladium Bayan
129-140 Greams Road
Chennai 600 006
+91 44 4228 5000

Hyderabad

Plot no. 77/A, 8-2-624/A/1, 4th
Floor, Road No. 10, Banjara Hills,
Hyderabad – 500034,
Andhra Pradesh
Phone +91-40 44246000

Kolkata

56 & 57, Block DN.
Ground Floor, A- Wing
Sector - V, Salt Lake
Kolkata - 700 091, West Bengal
+91-033 2357 9101/
4400 1111

Mumbai

PwC House
Plot No. 18A,
Guru Nanak Road (Station Road),
Bandra (West), Mumbai - 400 050
+91-22 6689 1000

Gurgaon

Building No. 10, Tower - C
17th & 18th Floor,
DLF Cyber City, Gurgaon
Haryana -122002
+91-124 330 6000

Pune

7th Floor, Tower A - Wing 1,
Business Bay, Airport Road,
Yerwada, Pune – 411 006+91-20
4100 4444

For more information

Contact us at
pwctr.knowledgemanagement@in.pwc.com

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