

## Transfer Pricing Country Profile

Name of Country: India

Date of profile : 16 February 2009

No.	Item	Reference to and wherever possible text of the provision; Wherever needed and possible, a translation into one of the OECD official languages would be welcome
1	<b>Reference to the Arm's Length Principle</b>	<p>Provisions relating to Transfer Pricing are mentioned in sections 92, 92A, 92B, 92C, 92CA, 92D, 92E, 92F, 93 of Chapter X of Income Tax Act 1961 (in short I.T. Act) and the relevant Rules for Transfer Pricing are Rule 10A, 10B, 10C, 10D and 10E of Income Tax Rules 1962 (in short I.T. Rule).</p> <p style="text-align: center;"><b>CHAPTER X</b></p> <p style="text-align: center;"><b>SPECIAL PROVISIONS RELATING TO AVOIDANCE OF TAX</b></p> <p><b>Computation of income from international transaction having regard to arm's length price.</b></p> <p><b>92. (1)</b> Any income arising from an international transaction shall be computed having regard to the arm's length price.</p> <p><i>Explanation.</i> – For the removal of doubts, it is hereby clarified that the allowance for any expense or interest arising from an international transaction shall also be determined having regard to the arm's length price.</p> <p>(2) Where in an international transaction, two or more associated enterprises enter into a mutual agreement or arrangement for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises, the cost or expense allocated or apportioned to, or, as the case may be, contributed by, any such enterprise shall be determined having regard to the arm's length price of such benefit, service or facility, as the case may be.</p> <p>(3) The provisions of this section shall not apply in a case where the computation of income under sub-section (1) or the determination of the allowance for any expense or interest under that sub-section, or the determination of any cost or expense allocated or apportioned, or, as the case may be, contributed under sub-section (2), has the effect of reducing the income chargeable to tax or increasing the loss, as the case may be, computed on the basis of entries made in the books of account in respect of the previous year in which the international transaction was entered</p> <p><b>The definition of arm's length price</b> is provided in section 92F (ii) of the IT Act which reads as under:  <b>92F.</b> In sections 92, 92A, 92B, 92C, 92D and 92E, unless the context otherwise requires, –</p> <p style="text-align: center;">(ii) "arm's length price" means a price which is applied or</p>

		<p>proposed to be applied in a transaction between persons other than associated enterprises, in uncontrolled conditions;</p> <p>Rule 10A, 10B, 10C and 10D of I.T Rule have references to <b>arm's length price</b> in the context of procedures to determine the arm's length price of the international transaction.</p>
2	<b>Reference to the OECD Transfer Pricing Guidelines (if any)</b>	No reference to OECD guidelines in the IT Act and I.T. Rule.
3	<b>Definition of related parties</b>	<p>Definition of related parties is provided under section 92A of the IT Act which is quoted below:</p> <p><b>Meaning of associated enterprise.</b></p> <p><b>92A.</b> (1) For the purposes of this section and sections 92, 92B, 92C, 92D, 92E and 92F, "associated enterprise", in relation to another enterprise, means an enterprise –</p> <ul style="list-style-type: none"> <li>(a) which participates, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise; or</li> <li>(b) in respect of which one or more persons who participate, directly or indirectly, or through one or more intermediaries, in its management or control or capital, are the same persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise.</li> </ul> <p>(2) [For the purposes of sub-section (1), two enterprises shall be deemed to be associated enterprises if, at any time during the previous year, –]</p> <ul style="list-style-type: none"> <li>(a) one enterprise holds, directly or indirectly, shares carrying not less than twenty-six per cent of the voting power in the other enterprise; or</li> <li>(b) any person or enterprise holds, directly or indirectly, shares carrying not less than twenty-six per cent of the voting power in each of such enterprises; or</li> <li>(c) a loan advanced by one enterprise to the other enterprise constitutes not less than fifty-one per cent of the book value of the total assets of the other enterprise; or</li> <li>(d) one enterprise guarantees not less than ten per cent of the total borrowings of the other enterprise; or</li> <li>(e) more than half of the board of directors or members of the governing board, or one or more executive directors or</li> </ul>

		<p>executive members of the governing board of one enterprise, are appointed by the other enterprise; or</p> <p>(f) more than half of the directors or members of the governing board, or one or more of the executive directors or members of the governing board, of each of the two enterprises are appointed by the same person or persons; or</p> <p>(g) the manufacture or processing of goods or articles or business carried out by one enterprise is wholly dependent on the use of know-how, patents, copyrights, trade-marks, licences, franchises or any other business or commercial rights of similar nature, or any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process, of which the other enterprise is the owner or in respect of which the other enterprise has exclusive rights; or</p> <p>(h) ninety per cent or more of the raw materials and consumables required for the manufacture or processing of goods or articles carried out by one enterprise, are supplied by the other enterprise, or by persons specified by the other enterprise, and the prices and other conditions relating to the supply are influenced by such other enterprise; or</p> <p>(i) the goods or articles manufactured or processed by one enterprise, are sold to the other enterprise or to persons specified by the other enterprise, and the prices and other conditions relating thereto are influenced by such other enterprise; or</p> <p>(j) where one enterprise is controlled by an individual, the other enterprise is also controlled by such individual or his relative or jointly by such individual and relative of such individual; or</p> <p>(k) where one enterprise is controlled by a Hindu undivided family, the other enterprise is controlled by a member of such Hindu undivided family or by a relative of a member of such Hindu undivided family or jointly by such member and his relative; or</p> <p>(l) where one enterprise is a firm, association of persons or body of individuals, the other enterprise holds not less than ten per cent interest in such firm, association of persons or body of individuals; or</p> <p>(m) there exists between the two enterprises, any relationship of mutual interest, as may be prescribed.</p>
4	<b>Transfer</b>	Transfer Pricing Methods are prescribed in section 92C of the IT Act.

pricing methods	<p><b>Computation of arm's length price.</b></p> <p><b>92C.</b>(1) The arm's length price in relation to an international transaction shall be determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the Board may prescribe, namely :—</p> <ul style="list-style-type: none"> <li>(a) comparable uncontrolled price method;</li> <li>(b) resale price method;</li> <li>(c) cost plus method;</li> <li>(d) profit split method;</li> <li>(e) transactional net margin method;</li> <li>(f) such other method as may be prescribed by the Board.</li> </ul> <p>(2) The most appropriate method referred to in sub-section (1) shall be applied, for determination of arm's length price, in the manner as may be prescribed</p> <p>(As on date no "such other method" has been prescribed by the Board.)</p> <p>Rule 10B of I.T. Rule prescribes the manner in which the most appropriate method is to be applied.</p> <p>Rule 10C of I.T. Rule describes criteria for selection of the most appropriate method as under:</p> <p><b>Most appropriate method.</b></p> <p><b>10C.</b>(1) For the purposes of sub-section (1) of section 92C, the most appropriate method shall be the method which is best suited to the facts and circumstances of each particular international transaction, and which provides the most reliable measure of an arm's length price in relation to the international transaction.</p> <p>(2) In selecting the most appropriate method as specified in sub-rule (1), the following factors shall be taken into account, namely:—</p> <ul style="list-style-type: none"> <li>(a) the nature and class of the international transaction;</li> <li>(b) the class or classes of associated enterprises entering into the transaction and the functions performed by them taking into account assets employed or to be employed and risks assumed by such enterprises;</li> <li>(c) the availability, coverage and reliability of data necessary for application of the method;</li> <li>(d) the degree of comparability existing between the international transaction and the uncontrolled transaction and between the enterprises entering into such transactions;</li> <li>(e) the extent to which reliable and accurate adjustments can be made to account for differences, if any, between the international transaction and the comparable uncontrolled transaction or</li> </ul>
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		<p>between the enterprises entering into such transactions;</p> <p>(f) the nature, extent and reliability of assumptions required to be made in application of a method.</p>
5	<b>Transfer pricing documentation requirement</b>	<p>The Transfer Pricing documentation requirement is governed by section 92D of I.T. Act and Rule 10E of I.T. Rule.</p> <p><b>Maintenance and keeping of information and document by persons entering into an international transaction.</b></p> <p><b>92D.</b> (1) Every person who has entered into an international transaction shall keep and maintain such information and document in respect thereof, as may be prescribed.</p> <p>(2) Without prejudice to the provisions contained in sub-section (1), the Board may prescribe the period for which the information and document shall be kept and maintained under that sub-section.</p> <p>(3) The Assessing Officer or the Commissioner (Appeals) may, in the course of any proceeding under this Act, require any person who has entered into an international transaction to furnish any information or document in respect thereof, as may be prescribed under sub-section (1), within a period of thirty days from the date of receipt of a notice issued in this regard :</p> <p><b>Provided</b> that the Assessing Officer or the Commissioner (Appeals) may, on an application made by such person, extend the period of thirty days by a further period not exceeding thirty days.</p> <p><b>Report from an accountant to be furnished under section 92E is prescribed under Rule 10E of I.T. Rule.</b></p> <p><b>10E.</b> The report from an accountant required to be furnished under section 92E by every person who has entered into an international transaction during a previous year shall be in Form No. 3CEB and be verified in the manner indicated therein.]</p>
6	<b>Specific transfer pricing audit procedures and/or specific transfer pricing penalties</b>	<p>The procedure for computation of arm's length price is provided under section 92C(3) and 92CA of the I.T. Act.</p> <p><b>92C(3).</b> Where during the course of any proceeding for the assessment of income, the Assessing Officer is, on the basis of material or information or document in his possession, of the opinion that—</p> <ul style="list-style-type: none"> <li>(a) the price charged or paid in an international transaction has not been determined in accordance with sub-sections (1) and (2); or</li> <li>(b) any information and document relating to an international transaction have not been kept and maintained by the assessee in accordance with the provisions contained in sub-section (1) of section 92D and the rules made in this behalf; or</li> <li>(c) the information or data used in computation of the arm's length price is not reliable or correct; or</li> <li>(d) the assessee has failed to furnish, within the specified time, any information or document which he was required to furnish by a notice issued under sub-section (3) of section 92D,</li> </ul>

the Assessing Officer may proceed to determine the arm's length price in relation to the said international transaction in accordance with sub-sections (1) and (2), on the basis of such material or information or document available with him:

**Provided** that an opportunity shall be given by the Assessing Officer by serving a notice calling upon the assessee to show cause, on a date and time to be specified in the notice, why the arm's length price should not be so determined on the basis of material or information or document in the possession of the Assessing Officer.

(4) Where an arm's length price is determined by the Assessing Officer under sub-section (3), the Assessing Officer may compute the total income of the assessee having regard to the arm's length price so determined :

**Provided** that no deduction under section 10A [or section 10AA] or section 10B or under Chapter VI-A shall be allowed in respect of the amount of income by which the total income of the assessee is enhanced after computation of income under this sub-section :

**Provided further** that where the total income of an associated enterprise is computed under this sub-section on determination of the arm's length price paid to another associated enterprise from which tax has been deducted [or was deductible] under the provisions of Chapter XVIIIB, the income of the other associated enterprise shall not be recomputed by reason of such determination of arm's length price in the case of the first mentioned enterprise.

**Reference to Transfer Pricing Officer.**

**92CA.** (1) Where any person, being the assessee, has entered into an international transaction in any previous year, and the Assessing Officer considers it necessary or expedient so to do, he may, with the previous approval of the Commissioner, refer the computation of the arm's length price in relation to the said international transaction under section 92C to the Transfer Pricing Officer.

(2) Where a reference is made under sub-section (1), the Transfer Pricing Officer shall serve a notice on the assessee requiring him to produce or cause to be produced on a date to be specified therein, any evidence on which the assessee may rely in support of the computation made by him of the arm's length price in relation to the international transaction referred to in sub-section (1).

(3) On the date specified in the notice under sub-section (2), or as soon thereafter as may be, after hearing such evidence as the assessee may produce, including any information or documents referred to in sub-section (3) of section 92D and after considering such evidence as the Transfer Pricing Officer may require on any specified points and after taking into account all relevant materials which he has gathered, the Transfer Pricing Officer shall, by order in writing, determine the arm's length price in relation to the international transaction in accordance with sub-section (3) of section 92C and send a copy of his order to the Assessing Officer and to the assessee.

(3A) Where a reference was made under sub-section (1) before the 1st day

of June, 2007 but the order under sub-section (3) has not been made by the Transfer Pricing Officer before the said date, or a reference under sub-section (1) is made on or after the 1st day of June, 2007, an order under sub-section (3) may be made at any time before sixty days prior to the date on which the period of limitation referred to in section 153, or as the case may be, in section 153B for making the order of assessment or reassessment or recomputation or fresh assessment, as the case may be, expires.]

(4) On receipt of the order under sub-section (3), the Assessing Officer shall proceed to compute the total income of the assessee under sub-section (4) of section 92C in conformity with the arm's length price as so determined by the Transfer Pricing Officer.]

(5) With a view to rectifying any mistake apparent from the record, the Transfer Pricing Officer may amend any order passed by him under sub-section (3), and the provisions of section 154 shall, so far as may be, apply accordingly.

(6) Where any amendment is made by the Transfer Pricing Officer under sub-section (5), he shall send a copy of his order to the Assessing Officer who shall thereafter proceed to amend the order of assessment in conformity with such order of the Transfer Pricing Officer.

(7) The Transfer Pricing Officer may, for the purposes of determining the arm's length price under this section, exercise all or any of the powers specified in clauses (a) to (d) of sub-section (1) of section 131 or sub-section (6) of section 133.

*Explanation.*—For the purposes of this section, “Transfer Pricing Officer” means a Joint Commissioner or Deputy Commissioner or Assistant Commissioner authorised by the Board to perform all or any of the functions of an Assessing Officer specified in sections 92C and 92D in respect of any person or class of persons.]

As per existing instruction of Central Board of Direct Taxes, a case may be selected by the Assessing Officer for Transfer Pricing Audit if aggregate value of International Transactions exceeds Indian Rupee 150 million equivalents to US\$ 3.6 million (approx).

**Penalties** for violation of Transfer Pricing provisions are provided under following sections of I.T. Act.:

(1) 271 (1) (C) of the IT Act for concealment of income or for furnishing inaccurate particulars of such income:

(2) Section 271 G of IT Act, 1961 for failure of furnish documents u/s 92D Penalty for failure to keep and maintain information and documentation in respect of international transaction under section 271AA:

(3) Penalty for failure to furnish report under section 92E ( for failure to produce 3CEB report as prescribed and verified by an accountant) and other penalties which are levy able during the course of assessment like Penalty for failure to get accounts audited under

		<p>section.</p> <p>(4) 271B: penalty for failure to answer questions, sign statements, furnish information, returns or statements, allow inspection etc. under section 272A are also attracted.</p> <p><b>Depending upon the nature of offence there are provisions for prosecution under chapter XXII of the IT Act.</b></p>
7	<b>Relevant regulations on Advance Pricing Arrangements</b>	As to now, the Indian Transfer Pricing regulations do not contain any provisions regarding Advance Pricing Agreements.
8	<b>Link to relevant Government Internet sites</b>	<p><a href="http://www.incometaxindia.gov.in">www.incometaxindia.gov.in</a></p> <p><a href="http://law.incometaxindia.gov.in/TaxmannDit/IntTax/tpcont.aspx">http://law.incometaxindia.gov.in/TaxmannDit/IntTax/tpcont.aspx</a></p>
9	<b>Other relevant information</b>	The Directorate of Transfer Pricing in India is headed by Director General, (International Taxation) Income Tax Department, New Delhi, under the Department of Revenue, Ministry of Finance, Government of India. The Office of the Director General (International Taxation) is located in New Delhi. The Directorate of Transfer Pricing has offices in New Delhi, Mumbai, Kolkata, Chennai, Bangalore, Ahmedabad and Pune which are headed by Directors of Income Tax (Transfer Pricing).