



Central Board of Direct Taxes ('CBDT') issues FAQs on Advance Pricing Agreements (‘APA’) Rollback provisions

Transfer Pricing Alert
June, 2015

CBDT clarifies on APA Rollback provisions

APA provisions were introduced in India *vide* the Finance Act, 2012. An APA is an agreement between the Board and any person, which determines, in advance, the manner of determination of the arm's length price ('ALP'), in relation to an "international transaction". The APA program is designed to help taxpayers resolve actual or potential transfer pricing disputes in a proactive, cooperative manner, as an alternative to the traditional examination process. It provides greater certainty, mitigating the possibility of disputes. The term of the APA can be maximum of five years.

The Finance (No. 2) Act, 2014, provided for rollback mechanism in the APA program for a period of four years preceding the first previous year for which the APA is applied, subject to prescribed conditions. Thereafter, in March 2015, CBDT announced the rules and the procedure to give effect to the rollback provisions, following which the CBDT received several requests for clarifications in this regard. With a view to address concerns and clarify, the CBDT has in a unique question and answer format provided clarifications (*Circular No. 10/2015*).

The clarifications are:

Sr. No.	FAQs	Clarifications
1	Whether applicants who have filed return of income ('return') under Section 139(4) or 139(5) of the Income-tax Act, 1961 ('the Act') would be eligible for rollback?	<ul style="list-style-type: none">Rollback provisions will be available even in case of revised return filed under Section 139(5) of the Act, because the revised return replaces the original return.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	The meaning of the term 'same international transaction' referred to in the rollback provisions? Whether APA applicant can apply for rollback provisions if there is a change in the Functions, Assets, Risks ('FAR') analysis?	<ul style="list-style-type: none">It has been clarified that the term 'same' implies transaction of the same nature undertaken with the same associated enterprise(s) ('AEs') in respect of which the APA has been reached.It is also clarified that the rollback provisions would apply only if the FAR analysis of the rollback year does not diverge materially from the FAR validated for the purpose of reaching an APA with regard to the international transaction(s) to be undertaken in the future years. Further, the term 'materially' will mean a material change of facts and circumstances which could reasonably have resulted in an APA with significantly different terms and conditions.
3	Whether rollback has to be requested for all 4 years or applicant can choose any year(s) out of the block of 4 years?	<ul style="list-style-type: none">An applicant has to choose all the 4 years for rollback, <i>unless</i>:<ul style="list-style-type: none">a. the relevant international transaction was not undertaken in any of the 4 years; orb. the applicant fails the prescribed rollback conditions in any of the 4 years. In such cases, the applicant can still apply for rollback for the other years.
4	Appeal before the tax authorities, (i.e. whether there is a bar in case of the year where an order in appeal is passed by the Tribunal in respect of the determination of ALP for the international transaction)	<ul style="list-style-type: none">Rollback provisions would not be applicable for the international transaction for which the Tribunal has passed an order disposing of an appeal, since the Tribunal is the final fact finding authority, and hence on factual issues the matter would be assumed to have reached finality in that year.On the other hand, if the Tribunal has not decided the matter and has only set

		aside the order for fresh consideration by the lower authorities with <i>full discretion</i> at their disposal, the matter shall not be treated as one having reached finality. Thereby rollback provisions would be applicable.
5	Whether the rollback provisions can be applied in a manner to ensure that the returned income/loss is accepted as the final income/loss after applying the rollback provisions?	<ul style="list-style-type: none"> In case the terms of rollback provision contain specific agreement between the CBDT and the applicant that the agreed determination of ALP is subject to the condition that the rollback benefit would be limited to the extent of declared income and not reduce the total income or increase the total loss.
6	In the event the applicant fails to take required action for claiming a rollback benefit for some years after signing of the APA, whether the entire APA would stand cancelled or only those rollback years will be affected in which the applicant has failed to take the required action?	<ul style="list-style-type: none"> Rule 10RA to be followed which specifies action to be taken by the applicant to effectuate the rollback provision. If rollback provisions are not given effect to in accordance with the prescribed rules, then the entire APA agreement would stand cancelled.
7	What would be the view of the APA authorities if Mutual Agreement Procedure ('MAP') is pending or has already been concluded for a rollback year?	<ul style="list-style-type: none"> If MAP has been concluded for any international transaction(s) in any of the rollback years under APA, rollback provisions would not be allowed for those international transaction(s) for that year but could be allowed for other years or for other international transactions for that year. If MAP request is pending for any of the rollback years under APA, the APA applicant can exercise an option to pursue MAP or the rollback application.
8	Determination of ALP	<ul style="list-style-type: none"> ALP could be different for different years. However, the manner of determination of ALP (including choice of method, comparability analysis and tested party) would need to be the same as that agreed in the APA.
9	Whether compliance audit for rollback required? Would critical assumptions need to be validated during compliance audit?	<ul style="list-style-type: none"> ALP for rollback years would be agreed after full examination of all the facts including validation of critical assumptions. Accordingly, compliance audit for the rollback years would be required, to check if the agreed price or methodology has been applied in the modified return.
10	Withdrawal of rollback application	<ul style="list-style-type: none"> Applicant has an option to withdraw its rollback application even while maintaining the APA application for the future years. However, the applicant cannot accept the rollback results without accepting the APA for the future years.
11	In case of already concluded APAs, whether new APAs would be signed for rollback or the earlier APAs could be revised?	<ul style="list-style-type: none"> Already concluded APAs may be revised to include rollback provisions.
12	In case of already concluded APAs, where the modified return has already been filed for the first year of the APA term, how will the time-limit for filing modified return for rollback years be determined?	<ul style="list-style-type: none"> Time to file modified return for rollback years will start from the date of signing the revised APA incorporating the rollback provisions.

13	In case of merger / de-merger of companies which company can claim the benefit of the APA?	<ul style="list-style-type: none"> • The APA is between the CBDT and a person (company). The principle to be followed is that the company who makes the APA application would only be entitled to enter into an APA and claim the benefit of rollback in respect of the international transaction(s) undertaken by it in the rollback years. • Other companies that have merged with the applicant company later or have de-merged from the applicant company would not be eligible for the rollback provisions under the APA.
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ELP COMMENTS

The Government has clarified some issues pertaining to the APA rollback provisions. The clarifications issued shall assist in eliminating cobwebs and enable the APA and rollback to be effective. This is a positive move by the Indian tax authorities, as they consciously make an effort to align themselves to the international norms.

However, there still are a few ambiguities pertaining to the APA rollback provisions which require further clarity such as:

- CBDT, while providing clarifications has stated that the 'same' international transaction should be undertaken with the 'same' AE. However, there could be an instance where the international transaction may be the same, but for certain reasons' is now undertaken with a different AE (i.e. merger). In such a scenario, the Circular appears to adopt a very stringent position to not consider an international transaction from applicability of the rollback provisions, even if the international transaction is the 'same'.
- The clarifications as provided by the CBDT state that the rollback provisions shall not be available when the Tribunal has decided the matter [ALP for the international transaction(s)], unless it has been set aside for fresh consideration by the lower authorities. The FAQs do not clarify what will be the situation where the Tribunal's order is appealed before the higher forum.

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