

Top 10 TP issues relevant in FY 2019-20

TP Certification

CA Chetan Rajput

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Disclaimer: The views and opinions in this presentation are expressed in individual capacity and do not necessarily reflect the view of the firm. Independent and detailed evaluation should be undertaken based on facts & circumstances of each case before taking any position.

Agenda

1 Indian TP Regulations

2 Form 3CEB – Quick refresh

3 Key issues for consideration in
FY 2019-20 TP certification

4 Other key aspects

5 Concluding Remarks



Indian TP regulations



Indian TP regulations

- ▶ **Sec 92E provides as under**

“Every person who has entered into an international transaction or specified domestic transaction during a previous year shall obtain a report from an accountant and furnish such report on or before the specified date in the prescribed form duly signed and verified in the prescribed manner by such accountant and setting forth such particulars as may be prescribed.”

- ▶ Form 3CEB must be obtained by every tax payer filing a return in India and having international transaction or specified domestic transaction (SDT)
- ▶ To be filed electronically one month before the due date for filing return of income (i.e., 31 October)

Indian TP regulations

- ▶ No threshold for filing of Form 3CEB - Even if the Taxpayer has entered into international transactions of **INR 1**. For SDT, reporting is mandatory if aggregate value of such transactions exceeds **INR 20 Crores**.
- ▶ Non filing of Form 3CEB may give rise to following penal consequences:
 - ▶ Penalty under Section 271AA at the rate of 2% of the value of each international transaction for non-reporting of transaction; and
 - ▶ Penalty under Section 271BA amounting to INR 1 lac for non-filing of Form 3CEB.
- ▶ The Institute of Chartered Account of India has issued a Guidance Note (GN) on report on international transactions u/s 92E of the Act (latest version issued in August 2020 incorporating amendments made by Finance Act 2019 & 2020)

Indian TP regulations

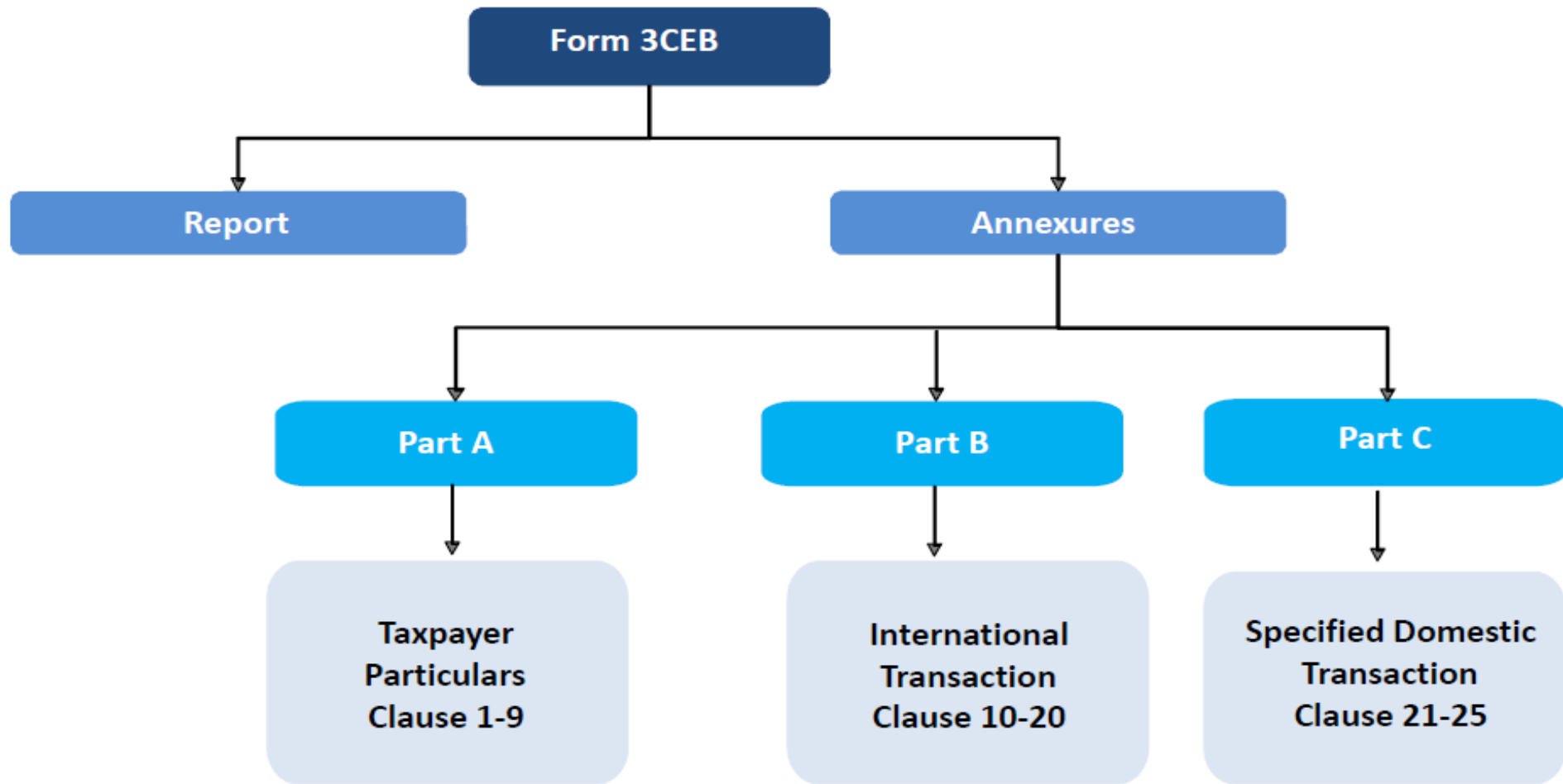
Applicability to Foreign Companies

- ▶ Mirror Form 3CEB
- ▶ Payments made by the foreign affiliate (i.e. Income of the Indian entity) need not be disclosed
- ▶ Further, only taxable income (such as royalty, interest, service fees etc.) in the hands of the foreign affiliate is to be disclosed – refer Section 115A
- ▶ Return of Income of the Foreign company would be the starting point
- ▶ Important to refer Form 26AS
- ▶ Exemption could be for return as per Treaty/ Income tax Act; However, no exemption for TP compliances
- ▶ Equal applicability to permanent establishment of overseas enterprise

Form No. 3CEB – Quick Refresh



Structure of Form No. 3CEB



Changes introduced in Part C vide Notification No. 82/2020 dated 1st October 2020

Form No. 3CEB

FORM NO. 3CEB

[See rule 10E]

Report from an accountant to be furnished under section 92E relating to international transaction(s) and specified domestic transaction(s)

1. *I/We have examined the accounts and records of _____
(name and address of the assessee with Permanent Account Number or Aadhaar Number) relating to the international transaction (s) and the specified domestic transaction(s) entered into by the assessee during the previous year ending on 31st March, _____
2. In*my/our opinion proper information and documents as are prescribed have been kept by the assessee in respect of the international transaction(s) and the specified domestic transactions entered into so far as appears from *my/our examination of the records of the assessee.
3. The particulars required to be furnished under section 92E are given in the Annexure to this Form. In*my/our opinion and to the best of my/our information and according to the explanations given to *me/us, the particulars given in the Annexure are true and correct.

**Signed

Name

Address : Membership No. :

Place :

Date :

Opinion on whether prescribed documents and particulars in the report are **'True and correct'**

Form No. 3CEB

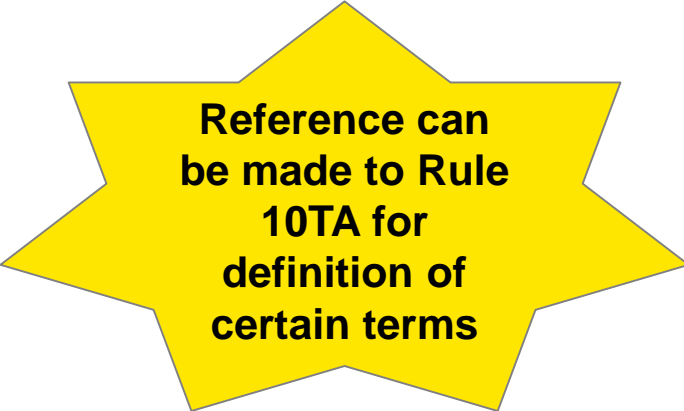
▶ Particulars under Form No. 3CEB – Part A

- ▶ List of associated enterprises with whom an Assessee has entered into international transactions, with the following details:
 - ▶ Name, address, PAN of the associated enterprise
 - ▶ Nature of business or activities of the Assessee (code for nature of activity to be filled as per instruction for filing the ITR-6)
 - ▶ Aggregate value of **International transactions** as per books of accounts
 - ▶ Aggregate value of **SDT** as per books of accounts

Form No. 3CEB (contd..)

▶ Particulars under Form No. 3CEB – Part B

- ▶ Information needs to be given regarding the following transactions:
 - ▶ List of AEs with whom assessee has entered into international transactions, the relationships between them and their business activities in brief
 - ▶ Purchase/ sale of raw materials, consumables or any other supplies for assembling/processing/manufacturing of goods/articles
 - ▶ Purchase/ sale of traded/finished goods
 - ▶ Purchase/ sale of any other tangible moveable/ immovable property or lease of such property
 - ▶ Purchase/ sale/ use of intangible property such as know-how, patents, copyrights, licenses, etc.
 - ▶ Provision/ availing of services
 - ▶ Capital Financing
 - ▶ Business Restructuring
 - ▶ Other mutual agreements
 - ▶ Any other transactions
 - ▶ Deemed International Transactions



**Reference can
be made to Rule
10TA for
definition of
certain terms**

Form No. 3CEB (contd..)

- ▶ **Particulars under Form No. 3CEB – Part C (in relation to SDT)**
 - ▶ Name, address and PAN of the associated enterprises
 - ▶ Nature of relationship
 - ▶ Brief description of the business carried out by the associated enterprises
 - ▶ Transactions disclosure :
 - ▶ Eligible business referred to in section [80A(6), 80IA(8) or 10AA] transferring / acquiring any goods or services to/ from any other business carried on by the Assessee
 - ▶ Any SDT(s) resulted in more than ordinary profits to an eligible business to which section 80IA(10) or section 10AA applies
 - ▶ Any SDT(s) resulted in more than ordinary profits with any persons referred to in sub-section (6) of section 115BAB (newly inserted clause vide Notification No. 82/2020 dated 1st October 2020)
 - ▶ Any other SDT not specifically referred to the above

Procedural aspects

- ▶ **Register:** Practising CAs are required to create their separate user-id on e-filing website as '**Tax Professional**' by using their PAN and Digital Signature Certificate. Taxpayers are required to add such name of CA for the desired audit report and tax year in their own profile on the e-filing website.
 - ▶ **Electronic filing:** CAs are required to upload Form 3CEB with their digital signature (by procedure comparable to e-filing of return). Once Form 3CEB is successfully uploaded, it appears in 'Worklist' of respective taxpayer's profile. The concerned taxpayer should **accept or reject the report** on the website.
 - ▶ **Notes to Form 3CEB:** There is no provision for providing notes to Form 3CEB in the present format. Although this can be added as part of other attachments.
 - ▶ **Practical way:** CA may issue a memo/ written document presenting notes against the relevant clauses or Annexure to Form 3CEB and the tax payer may file the physical copy of the Form 3CEB with the desired notes along with the online filing of the said report with the Income-tax department. This approach is also recognised by ICAI in its GN on Section 92E.
 - ▶ Filing of detailed notes along with Form 3CEB would support in clarifying the positions adopted while filing Form 3CEB online by the CA. This would also help the taxpayer during audits initiated by Revenue Authorities (RA).
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Procedural aspects

- ▶ **Revision of Form 3CEB:** Income-tax Act or rules do not specify any provision for revising of original Form 3CEB in case of any errors. However practically, it can be revised prior to initiation of audit proceedings. Revised Form 3CEB can be filed online & followed up with physical filing before the RA. Whilst revising Form 3CEB, one will need to provide the reason for revising the form.
- ▶ **Populating the Utility:** Utility requires typing one field entry at a time. There is no import from Excel feature. Ensure and use the updated version of the utility. Fill offline form & upload XML.
- ▶ One has to specify the **'Method used for determining arms length price'** for each transaction from the pre-populated field of the six specified methods and there is no option to keep it blank. If kept blank, the form will not get uploaded & throw an error!!

Key issues for consideration in FY 2019-20's TP certification



Clause 11(A) & 11(B): Tangible Property

Clause 11(A) : Purchase or sale of Raw material or consumables for further manufacturing / processing

11.	Particulars in respect of transactions in tangible property.	
	A. Has the assessee entered into any international transaction(s) in respect of purchase/sale of raw material, consumables or any other supplies for assembling or processing/manufacturing of goods or articles from/to associated enterprises?	
	If 'yes', provide the following details in respect of each associated enterprise and each transaction or class of transaction :	Yes/No <input type="checkbox"/>
	(a) Name and address of the associated enterprise with whom the international transaction has been entered into.	<input type="text"/>
	(b) Description of transaction and quantity purchased/sold.	<input type="text"/>
	(c) Total amount paid/received or payable/receivable in the transaction—	
	(i) as per books of account;	<input type="text"/>
	(ii) as computed by the assessee having regard to the arm's length price.	<input type="text"/>
	(d) Method used for determining the arm's length price [See section 92C(1)]	<input type="text"/>

Clause 11(B) : Purchase or sale of traded /finished goods

	B. Has the assessee entered into any international transaction(s) in respect of purchase/sale of traded/finished goods?	
	If 'yes' provide the following details in respect of each associated enterprise and each transaction or class of transaction :	Yes/No <input type="checkbox"/>
	(a) Name and address of the associated enterprise with whom the international transaction has been entered into.	<input type="text"/>
	(b) Description of transaction and quantity purchased/sold.	<input type="text"/>
	(c) Total amount paid/ received or payable/ receivable in the transaction	
	(i) as per books of accounts;	<input type="text"/>
	(ii) as computed by the assessee having regard to the arm's length price.	<input type="text"/>
	(d) Method used for determining the arm's length price [See section 92C(1)]	<input type="text"/>

Clause 11(C): Tangible Property

Clause 11(C) : Purchase, sale, transfer, lease, use of any other tangible property

C. Has the assessee entered into any international transaction(s) in respect of purchase, sale, transfer, lease or use of any other tangible property including transactions specified in Explanation (i)(a) below section 92B(2)?

Yes/No

If 'yes' provide the following details in respect of each associated enterprise and each transaction or class of transaction:

(a) Name and address of the associate enterprise with whom the international transaction has been entered into.

(b) Description of the property and nature of transaction.

(c) Number of units of each category of tangible property involved in the transaction.

(d) Amount paid/received or payable/receivable in each transaction of purchase/sale/transfer /use, or lease rent paid/received or payable/receivable in respect of each lease provided/entered into —

(i) as per books of account;

(ii) as computed by the assessee having regard to the arm's length price.

(e) Method used for determining the arm's length price [See section 92C(1)]

Includes Capital goods or Fixed Assets like Building / Vehicles / Machinery

Clause 11: Tangible Property

Aspects	11(A)	11(B)	11(C)
Examples	Purchase of Raw materials	Purchase or Sale of Finished goods	Purchase of Fixed Assets
Quantitative details	Backup of details reported should be maintained along with the quantity of each item.		
Documentation	<ul style="list-style-type: none"> • Check value and quantitative details from notes to accounts (in addition to AS 18), invoices and ledger accounts; • Customs valuation & notes to accounts disclosing foreign exchange outflow, in case of imports; • Group pricing policy. 		Fixed Asset Schedule; Cost details for assets manufactured by AEs; Back to back invoicing (in case of purchase from 3 rd party); and Independent Valuation Report for used assets.
Benchmarking	CUP, Resale Price method (RPM), Cost plus method (CPM) or aggregation under Transactional Net Margin Method (TNMM) with other transactions, if closely linked.		CUP, Other Method

Clause 11: Tangible Property

Issues	Disclosure
Sale of raw materials not utilized for processing/ manufacturing	As per ICAI GN, to be reported in clause 11(A)
Lack of availability of quantitative details	CA to provide suitable clarificatory note (as per ICAI GN). Practically, while filing Form 3CEB, one could mention 'numerous' in quantity column.

Include foreign exchange loss capitalised on imported goods or software?

**Acquiring of technical know-how from AE which is capitalized in books of account?
Which clause?**

WDV in books can be considered as ALP on purchase/ sale of machinery to/ from AE?

Clause 12: Intangible Property

<p>12.</p>	<p>Particulars in respect of transactions in intangible property :</p> <p>Has the assessee entered into any international transaction(s) in respect of purchase, sale, transfer, lease or use of intangible property including transactions specified in Explanation (i)(b) below section 92B(2)?</p> <p>If 'yes' provide the following details in respect of each associated enterprise and each category of intangible property :</p> <p>(a) Name and address of the associated enterprise with whom the international transaction has been entered into.</p> <p>(b) Description of intangible property and nature of transaction.</p>	<p>Yes/No <input type="checkbox"/></p> <p>_____</p> <p>_____</p>
	<p>(c) Amount paid/received or payable/receivable for purchase/sale/transfer/lease/use of each category of intangible property—</p> <p>(i) as per books of account;</p> <p>(ii) as computed by the assessee having regard to the arm's length price.</p> <p>(d) Method used for determining the arm's length price [See section 92C(1)]</p>	<p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p>

Wide definition of Intangible Property in Explanation to Section 92B(2)

Includes trademarks, trade names, brand names, logos, patents, know-how, literary works, copyrights, software copyrights, automated databases, industrial design, trade secrets, customer lists, trained and organised work force, **any other similar item that derives its value from its intellectual content rather than its physical attributes.**

Clause 12: Intangible Property

Aspect	Considerations
Disclosure	Any Purchase, Sale, Transfer, Lease or Use of Intangible property
Documentation	<p>Review agreement and computation, withholding tax certificates. Detailed evaluation required for identification of such transactions not apparent from accounts incl.</p> <ul style="list-style-type: none"> ✓ Past & on-going litigation history for transactions, ✓ Master File of Group should also be referred, for other than legally owned intangibles or Off Balance Sheet Intangible property
Benchmarking	<ul style="list-style-type: none"> • CUP, though, difficulty due to lack of broadly similar comparable companies in particular sectors whilst conducting search on external data basis for royalty rates. • Independent Valuation Report in case of transfer.
Issues	<ul style="list-style-type: none"> • Whether AMP (Advertising, Marketing & Promotion) expenses are required to be disclosed? If yes, under this clause? • Existing agreement for use of intangible property, but not charged by AE, disclosure required? • Use of proprietary computer software? With charge or without charge? Disclosure?
Important judicial precedents	<p>AMP whether international transaction:</p> <ul style="list-style-type: none"> • Maruti Suzuki India Ltd. v. CIT [2015] 381 ITR 117 (Delhi HC) • Bausch & Lomb Eyecare (India) (P.) Ltd. v. Addl. CIT [2016] 381 ITR 226 (Delhi HC) <p>Real income theory in TP (applicable for other transactions as well):</p> <ul style="list-style-type: none"> • Bombay Dyeing & Mfg. Co. Limited [ITA No. 1716/Mum/2017] (In favor) • Instrumentarium Corporation (Kol SB) I.T.A. Nos.1548 and 1549/Kol/2009 (Against)

Clause 13: Services

13.	<p>Particulars in respect of providing of services :</p> <p>Has the assessee entered into any international transaction(s) in respect of Services including transactions as specified in Explanation (i)(d) below section 92B(2)?</p> <p>If 'yes' provide the following details in respect of each associated enterprise and each category of service :</p> <p>(a) Name and address of the associated enterprise with whom the international transaction has been entered into.</p> <p>(b) Description of services provided/availed to/from the associated enterprise.</p> <p>(c) Amount paid/received or payable/receivable for the services provided/taken—</p> <p style="padding-left: 20px;">(i) as per books of account;</p> <p style="padding-left: 20px;">(ii) as computed by the assessee having regard to the arm's length price.</p> <p>(d) Method used for determining the arm's length price [See section 92C(1)]</p>	<p>Yes/No <input type="checkbox"/></p> <hr style="border: 1px solid black;"/> <hr style="border: 1px solid black;"/> <hr style="border: 1px solid black;"/> <hr style="border: 1px solid black;"/> <hr style="border: 1px solid black;"/> <hr style="border: 1px solid black;"/>
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- ▶ Market research,
- ▶ Market development,
- ▶ Marketing management,
- ▶ Administration,
- ▶ Technical service,

- ▶ Repairs,
- ▶ Design,
- ▶ Consultation,
- ▶ Agency,
- ▶ Scientific research, legal or accounting service

Clause 13: Services

Aspect	Considerations
Disclosure	Services rendered or availed
Documentation	<ul style="list-style-type: none"> • Agreement & invoice copies, debit notes raised; • AE Vs Non AE profitability in case of TNMM; • Working & basis of such segmental profitability, allocation key used for common expenses such as depreciation/ amortization, employee expenses etc.
Benchmarking	Availability of internal CUP, CPM, TNMM
Issues	<ul style="list-style-type: none"> • Confusion over classification in clause (13 or 17 or 19); • Determination of method to be applied in case of agreement for cost plus remuneration (common issue in case of IT/ ITes service agreements) - CPM vs TNMM; • Disclosure of other services not included in the explanation like software development, IT enabled Business Process Outsourcing (BPO) & Knowledge Process Outsourcing (KPO), IT support services, Engineering Services etc.

Reimbursement with administrative mark-up = Service?

Charge for salary of expats – Fees for technical service?

Services rendered without charge, but considered for GST?

Clause 14: Capital Financing

14.	<p>Particulars in respect of lending or borrowing of money :</p> <p>Has the assessee entered into any international transaction(s) in respect of lending or borrowing of money including any type of advance, payments, deferred payments, receivable, non-convertible preference shares/ debentures or any other debt arising during the course of business as specified in Explanation (i)(c) below section 92B (2)?</p> <p>(a) Name and address of the associated enterprise with whom the international transaction has been entered into.</p> <p>(b) Nature of financing agreement.</p> <p>(c) Currency in which transaction has taken place</p> <p>(d) Interest rate charged/paid in respect of each lending/borrowing.</p> <p>(e) Amount paid/received or payable/receivable in the transaction—</p> <p style="padding-left: 20px;">(i) as per books of account;</p> <p style="padding-left: 20px;">(ii) as computed by the assessee having regard to the arm's length price.</p> <p>(f) Method used for determining the arm's length price [See section 92C(1)]</p>	<p>Yes/No <input type="checkbox"/></p> <p><input type="text"/></p> <p><input type="text"/></p> <p><input type="text"/></p> <p><input type="text"/></p> <p><input type="text"/></p> <p><input type="text"/></p> <p><input type="text"/></p> <p><input type="text"/></p>
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Short / Medium term loans, Working capital loans/ facility, Fixed asset financing facility

Long term financing – non convertible preference shares / debentures, ECB

Trade advances / receivables – vide amendment in FA 2012

Clause 14: Capital Financing

Aspect	Considerations
Disclosure	Receipt or provision of debt
Documentation	<ul style="list-style-type: none"> • Review Agreement, borrowing terms, Currency of loan; • Determine Source of funding; • Review credit period extended to AE vs Non-AE along with Debtors ageing schedule.
Benchmarking	<ul style="list-style-type: none"> • CUP is most preferable method. Internal and External CUP for interest or coupon rate; • Depending on currency of the loan [INR – SBI MCLR, Foreign Currency – LIBOR + Spread (keeping in mind Indian Exchange Control Regulations)]; • Tenure of the loan (short term or long term); • Purpose of loan.
Issues	<ul style="list-style-type: none"> • Whether bank quotations are acceptable benchmark? • Whether loan amount needs to be disclosed every year or one time disclosure? • Whether coupon rate benchmarking required every year or the one available at the time of issue/ availing loan is appropriate over the tenure? • Interest Free loans in case of loss making companies – concept of shareholder activity or commercial expediency, real income theory? Disclosure? • Moratorium period for interest? Disclosure? • Separate disclosure & benchmarking required for outstanding receivables/ payables emanating from transactions already disclosed in other clauses? Duplication? • Whether interest write off needs to be disclosed? Benchmarking?

Clause 15: Guarantee

15.	<p>Particulars in respect of transactions in the nature of guarantee:</p> <p>Has the assessee entered into any international transaction(s) in the nature of guarantee?</p> <p>If yes, provide the following details:</p> <p>(a) Name and address of the associated enterprise with whom the international transaction has been entered into.</p> <p>(b) Nature of guarantee agreement</p> <p>(c) Currency in which the guarantee transaction was undertaken</p> <p>(d) Compensation/ fees charged/ paid in respect of the transaction</p> <p>(e) Method used for determining the arm's length price [See section 92C(1)]</p>	<p>Yes/No <input type="text"/></p> <hr style="border: 1px solid black;"/> <hr style="border: 1px solid black;"/> <hr style="border: 1px solid black;"/> <hr style="border: 1px solid black;"/> <hr style="border: 1px solid black;"/>
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- Post amendment to **Section 92B** vide **FA 2012** by way of insertion of Explanation thereto, the scope of international transaction has been widened to specifically include **corporate guarantees**:

*(c) capital financing, including any type of long-term or short-term borrowing, **lending or guarantee**, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business;*

Clause 15: Guarantee

Aspect	Considerations
Disclosure	Explicit Corporate guarantees provided / received to / from AEs
Documentation	Identify from Contingent Liability and RPT Schedule in audited financials Determine nature from facility agreement Obtain Management Representation Letter for all guarantees**
Benchmarking	Check internal CUPs, bank guarantee fees paid, use scientific approach like interest saving approach to determine ALP
Issues	<ul style="list-style-type: none"> • Disclosure for Letter of Comfort? Performance guarantee? • Guarantee amount disclosure every year or only in year in which it is issued? • If no Guarantee fees charged – whether to disclose, method? • Whether Guarantee can be considered as shareholding activity and no charge required? • Whether quotations from banks can be used to justify charge?
Important judicial precedents	Bharti Airtel Ltd (ITA No 5816/Del/2012) (Not an international transaction); Everest Kanto Cylinders Ltd (ITA No 542/Mum/2012) (Bombay HC) (0.5% commission); Tega Industries Ltd. v. DCIT (ITA No. 1912/Kol/2012) (Shareholder activity).

Disclosure is mandatory as it is a specific clause and approach / position can be substantiated by way of notes to avoid stringent penal consequences of non-disclosure

Clause 16: Marketable securities, equity shares, OCDs/CCDs or convertible preference shares

<p>16.</p>	<p>Particulars in respect of international transactions of purchase or sale of marketable securities, issue and buyback of equity shares, optionally convertible/ partially convertible/ compulsorily convertible debentures/ preference shares:</p> <p>Has the assessee entered into any international transaction(s) in respect of purchase or sale of marketable securities or issue of equity shares including transactions specified in Explanation (i)(c) below section 92B (2)?</p> <p>If yes, provide the following details:</p> <p>(a) Name and address of the associated enterprise with whom the international transaction has been entered into.</p> <p>(b) Nature of transaction</p> <p>(c) Currency in which the transaction was undertaken</p> <p>(d) Consideration charged/ paid in respect of the transaction.</p> <p>(e) Method used for determining the arm's length price [See section 92C(1)]</p>	<p>Yes/No <input type="checkbox"/></p> <p><input type="text"/></p> <p><input type="text"/></p> <p><input type="text"/></p> <p><input type="text"/></p> <p><input type="text"/></p>
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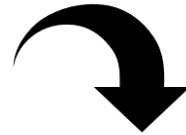
Clause 16: Marketable securities, equity shares, convertible debentures, CCDs, preference shares

Issue/ allotment of equity shares



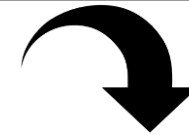
- ▶ In case of **Vodafone India Services Private Limited, Bombay HC** held the premium arising on issue of shares is a capital account transaction and does not give rise to income and, hence not liable to transfer pricing adjustment. This position has been accepted by the department vide **Instruction No. 2/2015 dated 29.01.2015**
- ▶ Basis the above, **ICAI GN** provides that such transaction may not be required to be reported u/s 92E read with Rules. **However, out of abundant caution, it may be disclosed**

Sale of equity shares



- ▶ **Requires disclosure**, may give rise to capital gains
- ▶ **Appropriate benchmarking** in form of independent valuation reports (**Other method**)

Issue or redemption / conversion of OCD / CCD / preference shares



- ▶ **Requires disclosure**
- ▶ **Appropriate benchmarking** using CUP for interest / coupon rate and independent valuation reports
- ▶ **Benchmarking** : Every year vs. at the time of issue

Issue of shares at lower price – Implications to Foreign AE?

Clause 17: Cost allocation or apportionment

1

Benefit Test

whether an *independent enterprise* in comparable circumstances would have been *willing to pay* for the activity if performed for it by an independent enterprise or would have performed the activity *in-house for itself*

3

Robust Documentation

- Inter-company Agreement, evidence of benefit
- Verify Working, allocation keys used
- Invoices / Debit notes from AE
- Audit certificate from AE.

2

Shareholder Activity

- Corporate governance, stock exchange listing of parent, reporting requirements of parents, consolidation of accounts, holding meetings etc. for **benefit of parent entity**
- Raising funds for acquisition of participants / subsidiaries

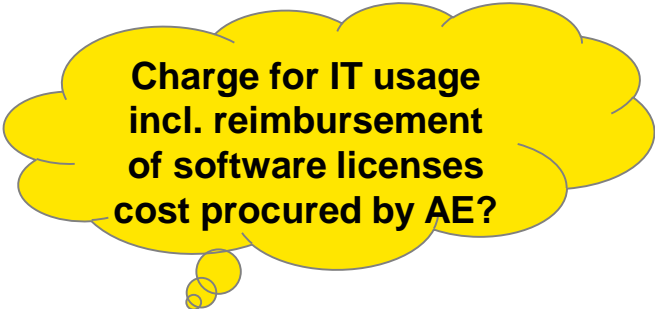
Penalty u/s 271AAD introduced for any **'false entry'** equal to amount of such entry.
Trigger in case of invoice without actual supply of goods/ services?

Shareholder activity is not considered to be an intra-group service, and thus does not justify a charge to/ by Group Companies

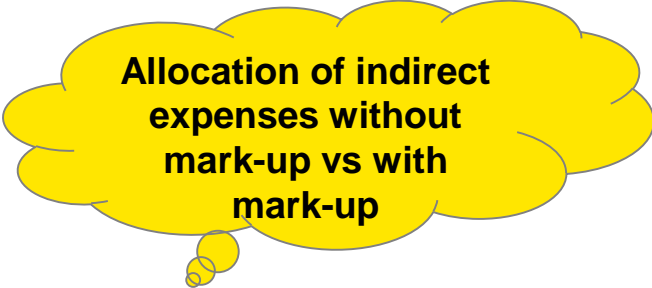
Clause 17: Cost allocation or apportionment

Cost Contribution Agreements:

- ❑ Arrangements between business enterprises to share the costs and risks of developing, producing, or obtaining assets, services or rights
- ❑ It is different than provision of services or cost allocation but rather cost incurred or contributed for mutual advantage
- ❑ Such contribution should meet arm's length principle and comparable with what an independent enterprise would have agreed to contribute under comparable circumstances given the benefits it reasonably expects to derive from the arrangement
- ❑ Disclosure under clause 17
- ❑ **Documentation:** Agreement, contribution vs. benefit analysis, etc.



Charge for IT usage
incl. reimbursement
of software licenses
cost procured by AE?



Allocation of indirect
expenses without
mark-up vs with
mark-up

Clause 18: Business Restructuring or reorganizations

18.	<p>Particulars in respect of international transactions arising out/ being part of business restructuring or reorganizations:</p> <p>Has the assessee entered into any international transaction(s) arising out/being part of any business restructuring or reorganization entered into by it with the associated enterprise or enterprises as specified in Explanation (i) (e) below section 92B (2) and which has not been specifically referred to above?</p> <p>If 'yes', provide the following details:</p> <p>(a) Name and address of the associated enterprise with whom the international transaction has been entered into.</p> <p>(b) Nature of transaction</p> <p>(c) Agreement in relation to such business restructuring/reorganization.</p> <p>(d) Terms of business restructuring/ reorganization.</p> <p>(e) Method used for determining the arm's length price [See section 92C(1)].</p>	<p>Yes/No <input type="checkbox"/></p> <p><input type="text"/></p> <p><input type="text"/></p> <p><input type="text"/></p> <p><input type="text"/></p> <p><input type="text"/></p>
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Irrespective of the fact that it has bearing on the profit, income, losses or assets of such enterprises at the time of the transaction or at any future date

Clause 18: Business Restructuring or reorganizations

- Income Tax Act does not define ‘**business restructuring**’
- **ICAI GN** places reliance on OECD TP Guidelines which define business restructuring as ‘***cross border re-organisation of the commercial or financial relations between AEs including the termination or substantial renegotiation of existing arrangements***’
- Operational change (change in FAR or characterization of the entity) **or** Organizational change (in ownership structure/ management of the entity)

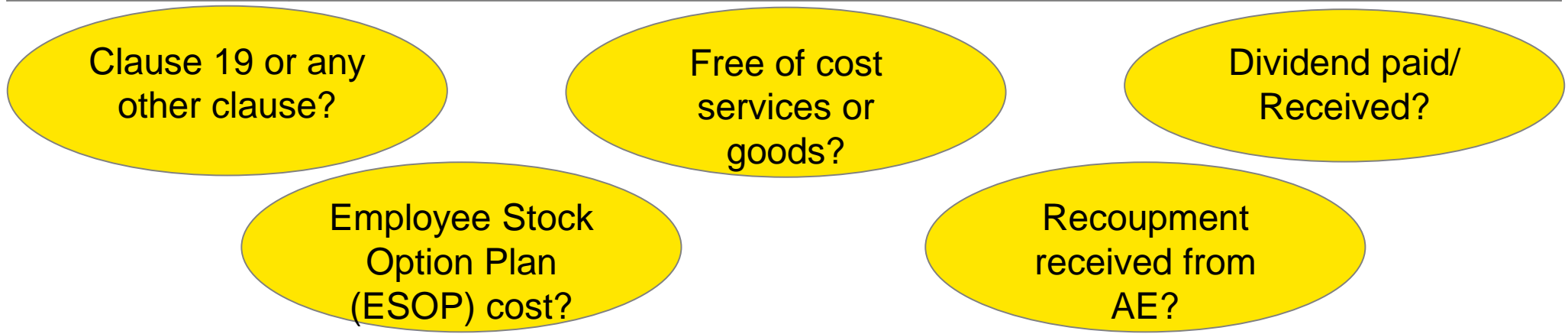
Aspects	Details
Examples	<ul style="list-style-type: none">• Conversion of full fledged manufacturer into a contract manufacturer;• Conversion of full fledged distributor into a low risk distributor;• Merger of two AEs to form single entity;• Demerger of business unit of entity with AE.
Documentation	<ul style="list-style-type: none">• Agreement & other reorganization details;• Any exit charge paid or received & its disclosure;• Cost benefit analysis;• Profitability of AE and taxpayer before and after restructuring.
Issues	<ul style="list-style-type: none">• Whether and how to disclose? Method of benchmarking?• Transfer between non-residents? Disclosure? – Indirect transfer provisions?• Duplication with other clauses?

Clause 19: Any other international transactions

<p>19.</p>	<p>Particulars in respect of any other transaction including the transaction having a bearing on the profits, income, losses or assets of the assessee:</p> <p>Has the assessee entered into any other international transaction(s) including a transaction having a bearing on the profits, income, losses or asset , but not specifically referred to above, with associated enterprise?</p> <p>If 'yes' provide the following details in respect of each associated enterprise and each transaction :</p> <p>(a) Name and address of the associated enterprise with whom the international transaction has been entered into.</p>	<p>Yes/No <input type="checkbox"/></p> <p><input type="text"/></p>
	<p>(b) Description of the transaction.</p> <p>(c) Amount paid/received or payable/receivable in the transaction—</p> <p>(i) as per books of account;</p> <p>(ii) as computed by the assessee having regard to the arm's length price.</p> <p>(d) Method used for determining the arm's length price [See section 92C(1)].</p>	<p><input type="text"/></p> <p><input type="text"/></p> <p><input type="text"/></p> <p><input type="text"/></p>

Clause 19: Any other international transactions

Aspect	Considerations
Disclosure	Any other transactions (not included in other clauses) including transactions having a bearing on profits, losses, income, assets or liability of the enterprise. Typically covers: <ul style="list-style-type: none"> - Cost Reimbursement/ Recovery of expenses (no service element)
Documentation	Agreement, verify inter-company invoices/ debit notes, back-to-back invoices, management representation for no profit element.
Benchmarking	Other method or separate benchmarking required?
Practical approach	*Along with disclosure in clause 19 , disclosures by way of notes to Form 3CEB, rationale for non-applicability of TP provisions, position/ approach taken in connection with benchmarking of the said transaction.

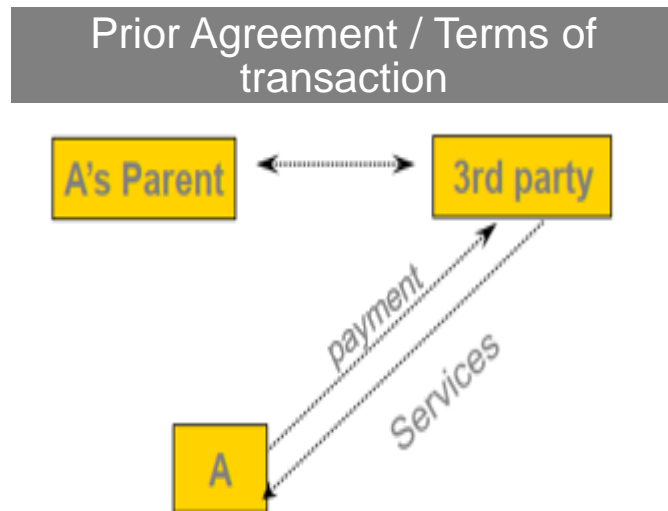


Clause 20: Deemed International Transaction

20.	<p>Particulars of deemed international transactions:</p> <p>Has the assessee entered into any transaction with a person other than an AE in pursuance of a prior agreement in relation to the relevant transaction between such other person and the associated enterprise?</p> <p>If yes, provide the following details in respect of each of such agreement</p> <p>(a) Name and address of the person other than the associated enterprise with whom the deemed international transaction has been entered into.</p> <p>(b) Description of the transaction.</p> <p>(c) Amount paid/received or payable/receivable in the transaction—</p> <p>(i) as per books of account;</p> <p>(ii) as computed by the assessee having regard to the arm's length price.</p> <p>(d) Method used for determining the arm's length price [See section 92C(1)].</p>	<p>Yes/No <input type="checkbox"/></p> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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- ❑ Deeming fiction created u/s Section 92B(2)
- ❑ **Extends ambit of transfer pricing provisions to transactions with unrelated parties**
- ❑ Target situations where the transaction appears to be between independent parties when viewed in isolation, however, in substance is influenced by the AE.

Clause 20: Deemed International Transaction



A transaction with an **unrelated company** (3rd party) is deemed to be an international transaction and **subject to transfer pricing regulations** if

- ▶ a **prior agreement** exists between A's AE and 3rd party in relation to services rendered by A to the 3rd party; or
- ▶ terms of transaction are determined **in substance** by A's AE and 3rd party

Pre-condition
Tax Payer or AE
or both: Non-
Resident

Irrelevant
3rd party:
Resident or Non
resident

Prior to amendment by Finance Act 2014, there was ambiguity whether such provision can be invoked for transaction between two resident entities. By Finance Act 2014, it was clarified that such provision can be invoked even between two Indian entities if conditions were fulfilled and that the residential status of the 3rd party is irrelevant

Clause 20: Deemed International Transaction

Aspect	Considerations
Identification & Documentation	<ul style="list-style-type: none"> • Difficult to identify as there is no reporting requirement under Companies Act or Accounting Standard • Discussions with Taxpayer team to identify such transactions • Collate evidence regarding influence of AE on price, terms of transactions, etc. • Check whether Taxpayer has power to decide or negotiate key terms or opt out of the agreement • Details of invoices, debit notes, etc. • Third party confirmations regarding amount paid / received
Disclosure	Sale / Purchase of goods / services or any other Transaction with Unrelated party fulfilling conditions of deemed international transactions
Benchmarking	To be carried out like any other international transactions with AE.
Issues	<ul style="list-style-type: none"> • Centralized Global supply chain arrangements set-up in MNCs for better pricing, volume discounts or quality purposes. • Triangular arrangements. • Quadrangular arrangements.
Important judicial precedents	<p>Ruling wherein Quadrangular arrangements are held to be not covered:</p> <ul style="list-style-type: none"> • CIT vs. Kodak India Private Limited (ITA No. 15/2014) – Mumbai ITAT

Specified Domestic Transactions

Structure

- ▶ Clause 21 : Details of Associated enterprises with whom assessee has entered into specified domestic transactions
- ▶ Clause 22 : Omitted* [Details in respect of transactions with persons referred in section 40A (2)(b)]
- ▶ Clause 23 & Clause 24 : Renumbered* as clause 22 and 23 respectively (discussed in detail in ensuring slides)
- ▶ Clause 24 : Newly inserted* to cover details in respect of transactions with persons referred to section 115BAB(6)
- ▶ **Clause 25 : Details of any other SDT not covered in above clauses.**

This residual clause is to cover transactions which may be prescribed per Section 92BA (vi). As there are no transactions which have been prescribed till date, this clause has to be replied by stating a “No”

* Changes introduced vide Notification No. 82/2020 dated 1st October 2020

Specified Domestic Transactions

Section 92BA - Limited Applicability

SDT defined as any of the following transaction(s), **which are not international transactions** (i.e. transactions where either one or both the parties to the transaction are non-residents)

(i) Omitted – [Payments to related parties as defined under section 40A(2)(b)]

Tax holiday related transactions (eligible business)

(ii) Any transaction referred to in section 80A

(iii) Any transfer of goods/services referred to in section 80IA(8)

(iv) Any business transaction referred to in section 80IA(10)

(v) Any transaction under Chapter VI-A or u/s 10AA – to which provisions of section 80IA (8) or section 80IA (10) apply


(va) Any business transacted with person referred to in section 115BAB(6)

(vi) Any other transaction as may be prescribed

and where the aggregate of such transactions entered into by the Assessee in the previous year exceeds a sum of **twenty crore rupees**.



Separate auditor for SDT & International Transactions?



Whether GST amount to be considered while determining threshold?

Renumbered Clause 22: Inter-unit transfer

22(A) Transfer of goods or services from one undertaking / unit / eligible business to another business

Particulars in respect of transactions in the nature of transfer or acquisition of any goods or services:	
A. Has any undertaking or unit or enterprise or eligible business of the assessee [as referred to in section 80A(6), 80IA(8) or section 10AA] transferred any goods or services to any other business carried on by the assessee?	Yes/No <input type="checkbox"/>
If yes, provide the following details in respect of each unit or enterprise or eligible business:	
(a) Name and details of business to which goods or services have been transferred	<input type="text"/>
(b) Description of goods or services transferred	<input type="text"/>
(c) Amount received/receivable for transferring of such goods or services –	
(i) as per the books of account;	<input type="text"/>
(ii) as computed by the assessee having regard to the arm's length price.	<input type="text"/>
(d) Method used for determining the arm's length price [See section 92C(1)].	<input type="text"/>

Example : Sale of goods or provision of services from Assessee's eligible business to other business

22(B) Acquisition of goods or services by one undertaking / unit / eligible business from another business

B. Has any undertaking or unit or enterprise or eligible business of the assessee [as referred to in section 80A(6), 80IA(8) or section 10AA] acquired any goods or services from another business of the assessee?	Yes/No <input type="checkbox"/>
If yes, provide the following details in respect of each unit or enterprise or eligible business:	
(a) Name and details of business from which goods or services have been acquired	<input type="text"/>
(b) Description of goods or services acquired	<input type="text"/>
(c) Amount paid/payable for acquiring of such goods or services–	
(i) as per the books of account;	<input type="text"/>
(ii) as computed by the assessee having regard to the arm's length price	<input type="text"/>
(d) Method used for determining the arm's length price [See section 92C(1)].	<input type="text"/>

Example : Purchase of goods or provision of services by Assessee's eligible business to other business

Renumbered Clause 22: Inter-unit transfer

Transfer of goods from one eligible tax holiday unit to another eligible tax holiday unit



- Reportable transaction under both limbs of clause 22(A) & 22(B)
- Documentation & benchmarking on similar basis as applicable for International transactions
- Recent Bangalore ITAT ruling in case of Wipro – Not Reportable.

Allocation of common cost to tax holiday units



- Whether allocation of common cost can be classified as provision of services and therefore reportable transaction?
- Depends on nature of cost allocated
- Prudent accounting norms
- Core Function allocation or limited to common costs?

Market Value replaced with principle of Arm's length price in case of SDT

Renumbered Clause 23: More than ordinary profits to eligible business u/s 80IA(10) or section 10AA

Particulars in respect of specified domestic transaction in the nature of any business transacted:	Yes/No <input type="checkbox"/>
Has the assessee entered into any specified domestic transaction(s) with any associated enterprise which has resulted in more than ordinary profits to an eligible business to which section 80IA(10) or section 10AA applies?	
If "yes", provide the following details:	
(a) Name of the person with whom the specified domestic transaction has been entered into	<input type="text"/>
(b) Description of the transaction including quantitative details, if any.	<input type="text"/>
(c) Total amount received/receivable or paid/ payable in the transaction -	<input type="text"/>
(i) as per books of account;	<input type="text"/>
(ii) as computed by the assessee having regard to the arm's length price.	<input type="text"/>
(d) Method used for determining the arm's length price [See section 92C(1)].	<input type="text"/>

- Income & Expense both sides are covered under this clause.
- Reporting under this clause is required where the eligible unit has generated "**more than ordinary profits**"
- The amount of profits from such transaction shall be determined having regard to **principle of arm's length price**
- **Robust documentation** to be maintained to substantiate that such transaction has not resulted in more than ordinary profits to the Assessee.
- Benchmarking on similar basis as laid out for international transactions (eg: TNMM to determine range of profits of uncontrolled comparables)
- Disclosure of such evaluation may be made by way of notes to Form 3CEB

Revised Clause 24: SDT with persons referred in Section 115BAB(6)

"24.	<p>Particulars in respect of specified domestic transaction in the nature of any business transacted between the persons referred to in sub-section (6) of section 115BAB:</p> <p>Has the assessee entered into any specified domestic transaction(s) with any persons referred to in sub-section (6) of section 115BAB which has resulted in more than ordinary profits expected to arise in such business?</p> <p>If "yes", provide the following details:</p> <p>(a) Name of the person with whom the specified domestic transaction has been entered into</p> <p>(b) Description of the transaction including quantitative details, if any.</p> <p>(c) Total amount received/receivable or paid/ payable in the transaction –</p> <p style="padding-left: 40px;">(i) as per books of account;</p> <p style="padding-left: 40px;">(ii) as computed by the assessee having regard to the arm's length price.</p> <p>(d) Method used for determining the arm's length price [See section 92C(1)].</p>	Yes/No ";
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- Income & Expense both sides are covered under this clause
- Example: Provision of services, Payment of interest etc.
- Disclosure required only ***if evaluation of profits leads to conclusion that it is not at arm's length***

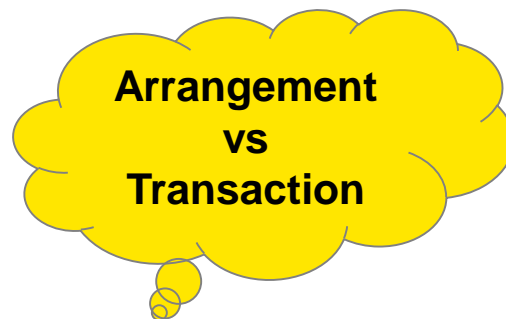
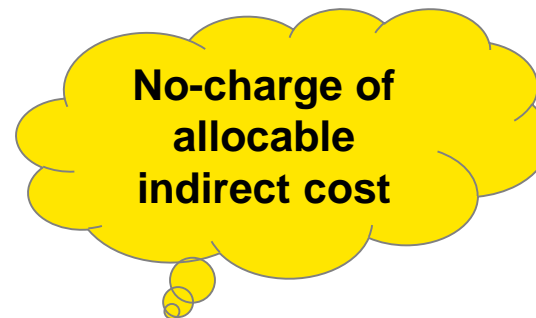
Revised Clause 24: Gist of Section 115BAB

Parameters	Details
Nature of benefit	Concessional rate of tax @15% (<i>plus surcharge and cess</i>) on total income of new domestic manufacturing companies from FY 2019-2020 onwards .
Qualifying taxpayers	<p>New company can exercise the option of 15% tax rate, subject to satisfaction of all of the following conditions:</p> <ul style="list-style-type: none"> ➤ It is set up and registered on or after 1 October 2019 and commences manufacturing on or before 31 March 2023; ➤ It is not formed by splitting up or reconstruction of existing business (<i>please refer slide no 12 - 14 for further discussion</i>); ➤ It does not use second-hand plant & machinery beyond threshold of 20% of total value of all plant & machinery (<i>except in case of imported machineries which have not been used in India and accordingly no deduction on account of depreciation has been allowed on the same</i>); ➤ It does not use any building previously used as a hotel or convention centre; ➤ It is engaged solely in the business of manufacture/ production of any article or thing and as the case may be, its related research or distribution
Transfer Pricing	<i>The transactions between the company claiming lower tax rate under section 115BAB and other domestic group entities, falls under the meaning of specified domestic transactions related provisions and needs to be at arm's length in compliance with the Indian transfer pricing regulations.</i>

Transactions covered: Clause 23 & 24

Examples :

- Interest on loans issued within the Group of companies;
- Rent payments within domestic related enterprises e.g., between SEZ Developer and SEZ units;
- Transaction of Royalty, Brand Equity Charges etc;
- Payments made for the use of common facilities like human resources, office facilities etc. between related enterprises.



Other key aspects



Secondary Adjustment

Reporting in Form 3CD and Impact in Form 3CEB

30A. (a) Whether primary adjustment to transfer price, as referred to in sub-section 1) of section 92Ce, has been made during the previous year? (Yes/No)

(b) If yes, please furnish the following details:—

- (i) Under which clause of sub-section (1) of section 92CE primary adjustment is made?
- (ii) Amount (in Rs.) of primary adjustment:
- (iii) Whether the excess money available with the associated enterprise is required to be repatriated to India as per the provisions of sub-section (2) of section 92CE? (Yes/No)
- (iv) If yes, whether the excess money has been repatriated within the prescribed time (Yes/No)
- (v) If no, the amount (in Rs.) of imputed interest income on such excess money which has not been repatriated within the prescribed time:

Primary Adjustment (PA)

(Exclude if PA < INR 1 Crore or PA for years prior to AY 16-17)

Repatriate from AE,
or deemed advance &
impute interest
thereon

OR

Pay one-time additional
tax,
Non-creditable, no
deduction against PA.

Impact on Form 3CEB :

Difference in amount reported in any clause between '**amount as per books of account**' & '**amount as computed by the Assessee having regard to the arms length price**' >>

Trigger for primary/ voluntary adjustment in tax return and correspondingly for secondary adjustment provisions in subsequent year.

Other key aspects: Checks & Balances

- ▶ Although it is responsibility of tax payer to identify related party / associated enterprises, CA should conduct following procedures & checks such as:
 - Obtain list of all Associated Enterprises from tax payer;
 - Review filings by reporting entity with regulatory authorities for name of associated enterprises & for directors holding positions in other companies;
 - Review stockholder listings of closely held companies;
 - Review material investments made during the period;
 - Review related party disclosures in audited financials.

 - ▶ Interview & discussions with Taxpayer to identify unreported transactions such as deemed international transactions, free of cost services / goods provided / received, guarantees or interest free loans etc.

 - ▶ APA signed by Taxpayer: Whether Form 3CEB filing required?
 - ▶ Exchange Rate applied in Form 3CEB reporting vs Income tax computation
 - ▶ COVID-19 impact disclosed in audited financials - Impact on International transactions/ SDTs?

 - ▶ **Responsibility of Tax Payer:** Listing out transactions, providing & maintaining information such as audited financial statements, detailed back-up of related party schedule, inter-company agreements & invoice, workings, policies etc
-

Concluding remarks



Concluding remarks

1 Verify the nature and value of international transaction and SDT as provided by the Taxpayer

4 Additional cross check for expenditure in forex, earnings in forex and CIF value of imports as per Notes to Accounts

7 Classify appropriately the transactions under relevant clauses of Form 3CEB

2 Reconcile Form 3CEB details with related party schedule as per Notes to Account & identify discrepancies, if any.

5 Undertake test checks for invoices, agreements, correspondence etc.

8 Documenting the positions applied relying on judicial precedents, Accounting Standards, Auditing standard or Guidance note issued by ICAI.

3 Review of inter-company ledger

6 Compare last year's Form 3CEB with current year's to ensure no regular international transactions are missed out.

9 Prepare notes to Form 3CEB and file a hard copy before the Assessing Officer within 15 days of online filing

Obtain Management representation for backup documentation & supporting available with Taxpayer to justify arm's length nature, amounts reported in Form 3CEB, particular of facts on the transactions reported.

CA Chetan Rajput

Mobile: 98901 88616

Email: Chetan.Rajput@in.ey.com

Thank You!