
**Western India Regional Council of
The Institute of Chartered Accountants of India**

International Tax Refresher Course

Dispute Resolution Mechanisms in India

Sunil Choudhary

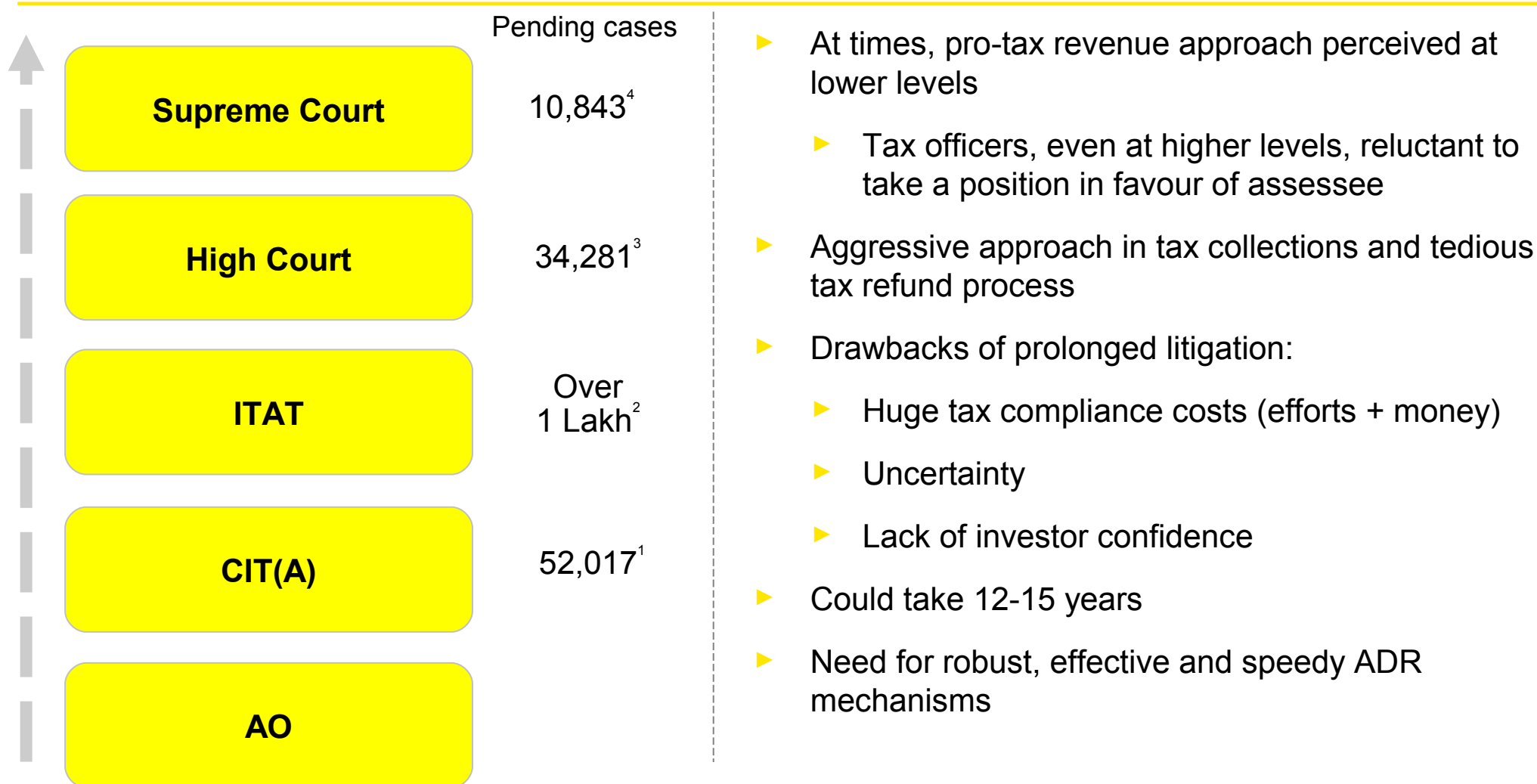
Partner, Ernst & Young LLP

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Backdrop

- ▶ Tax controversy - one of the main area of concern for any taxpayer/ investor in India
- ▶ Reasons for tax controversy:
 - ▶ Globalized operations of MNCs;
 - ▶ Characterization, PE constitution, attribution
 - ▶ Aggressive approach adopted by tax authorities during tax audits;
 - ▶ Lack of detailed guidelines;
 - ▶ Divergence from global best practices; etc
- ▶ Disputes on TP issues are on the rise globally and situation in India is no different
- ▶ India TP disputes overview:
 - ▶ Quantum of TP adjustment during FY 2012-13 was around INR 70,000 Crores
 - ▶ FY 2013-14 and FY 2014-15 saw a reverse trend
 - ▶ Settlement of dispute relating to valuation of shares by GOI
 - ▶ Currently, Indian TP disputes are being resolved through signing of APAs by GOI
 - ▶ Also, reduction in cases being referred to TPO (Instruction No. 3/2016 dated 10 March 2016)

Traditional dispute resolution mechanism



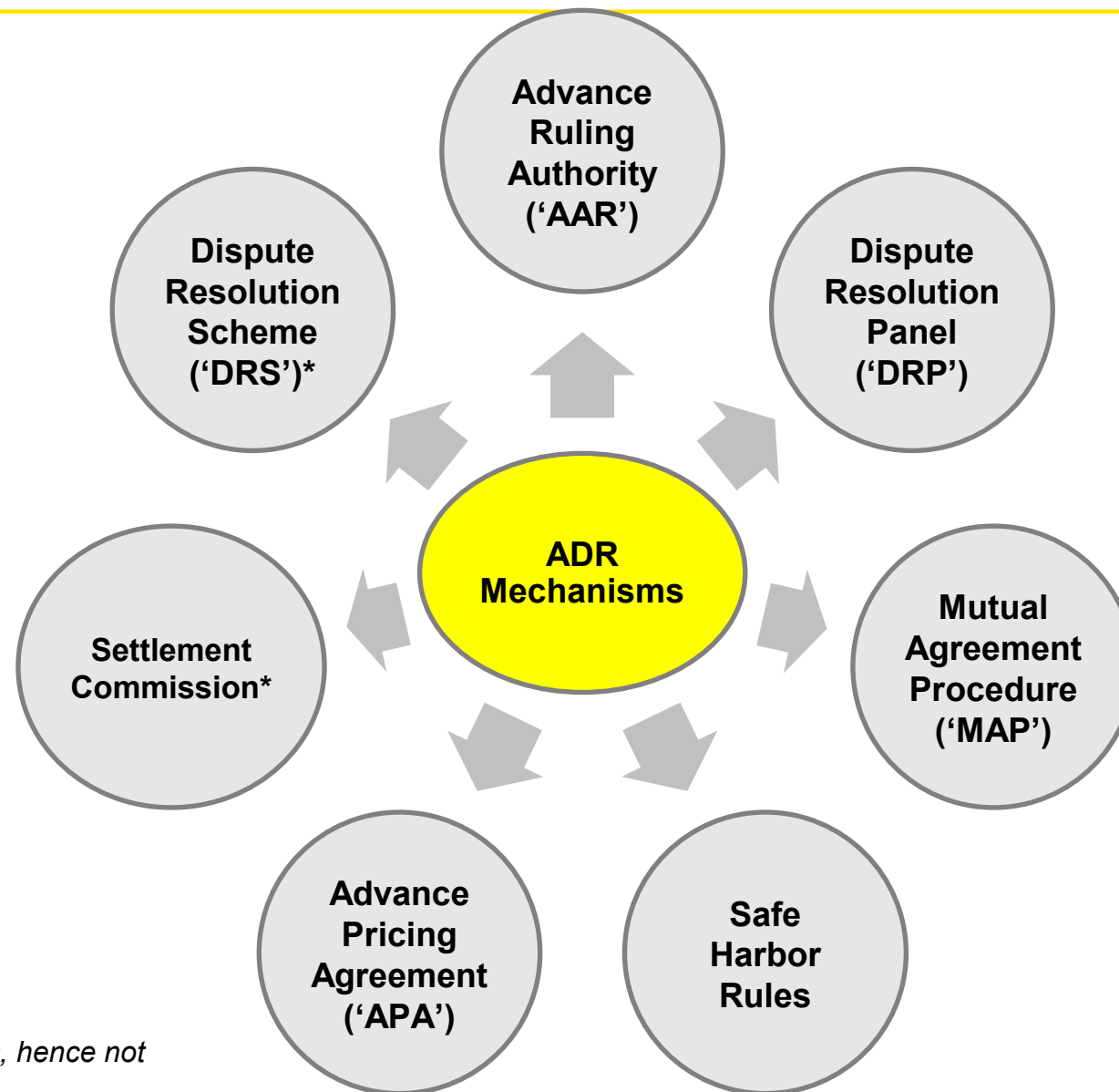
¹ as on 31 March 2015 – source : Times of India news article dated 15 June 2015

² as on 31 December 2015 – source : Time of India news article dated 9 February 2016

³ as on 31 March 2015 – source : Public Information Bureau Press Release dated 11 August 2015

⁴ as on 31 December 2014 – source : Business Standard news article dated 27 February 2015

Alternate Dispute Resolution (ADR)

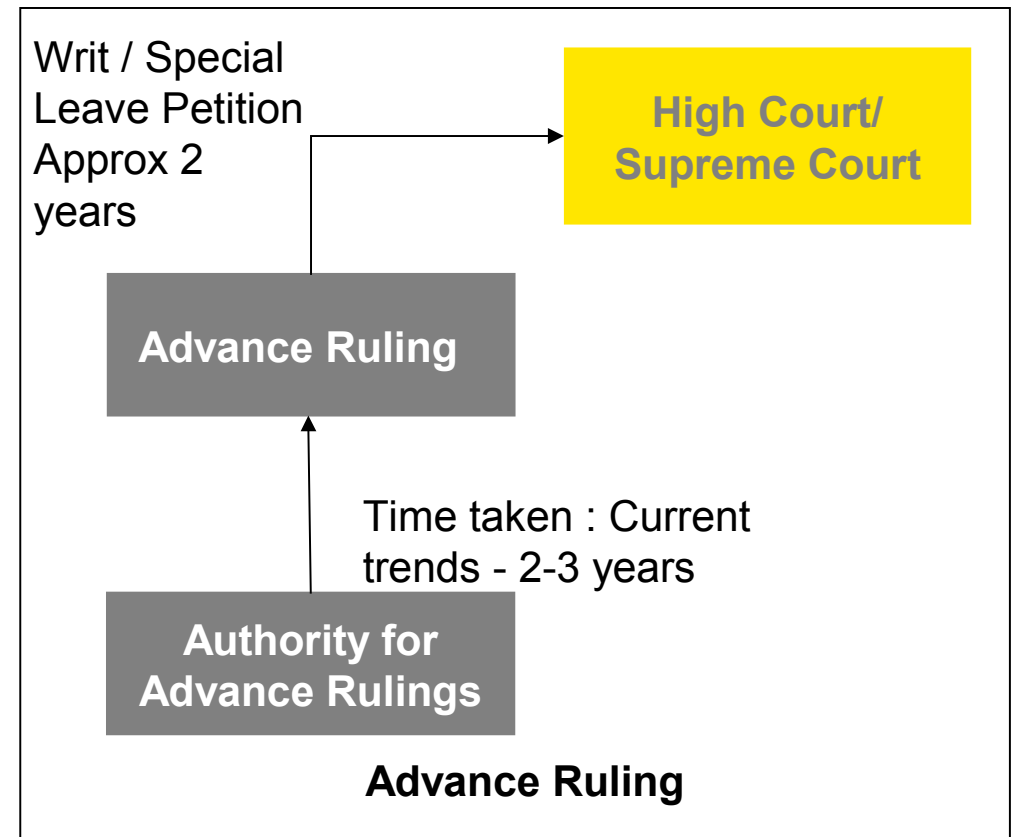
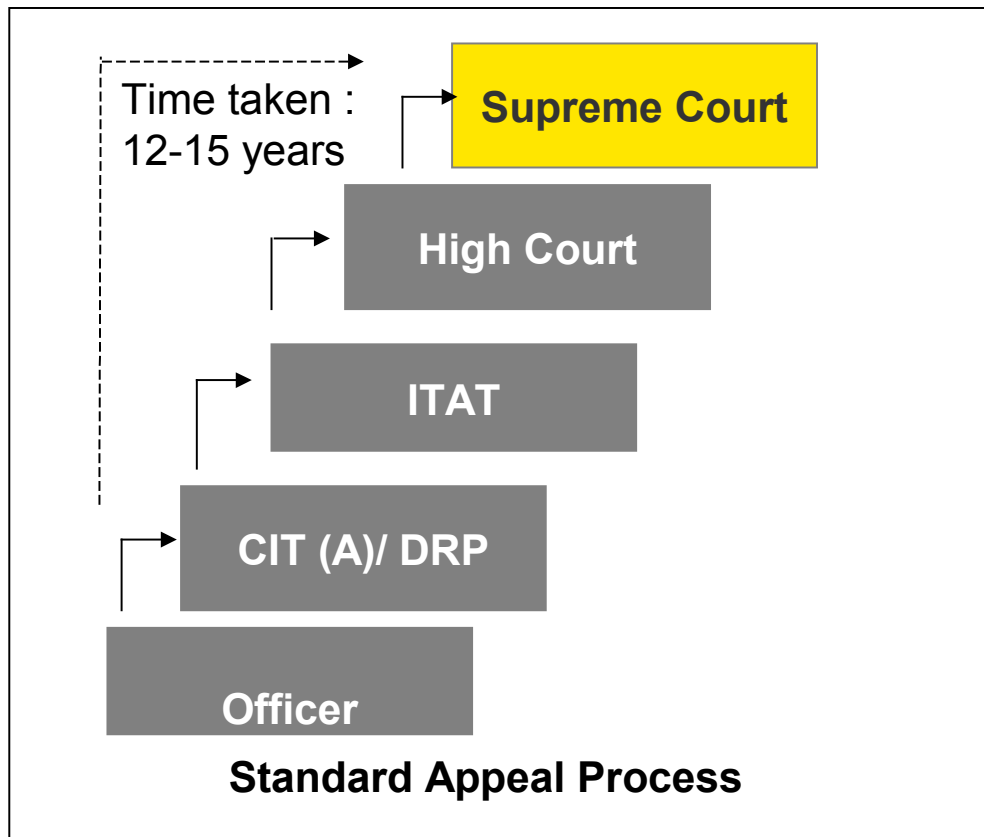


** Covers very specific cases, hence not discussed in details*



Key Benefits of Advance Ruling

- ▶ Independent quasi-judicial body
 - ▶ to consider international tax issues arising from proposed or existing transactions
- ▶ Helps foreign investors in planning their business affairs in an tax efficient manner
 - ▶ AAR rulings are binding only on the parties involved
- ▶ Faster dispute resolution process as compared to the normal litigation process



Who can apply

Applicant	Issue that can be put up before AAR	Fees	Applicable limitations
NR for his own tax liability (Form 34C)	Transaction undertaken or proposed to be undertaken by NR	Amount of transactions entered into or proposed to be undertaken: <ul style="list-style-type: none"> • Does not exceed Rs 100 crore – Rs 2 lacs • Exceeds Rs 100 crore but does not exceed Rs 300 crore – Rs 5 lacs • Exceeds Rs 300 crore – Rs 10 lacs 	<ul style="list-style-type: none"> • No pendency before tax authority/ Tribunal/ court • Non determination of FMV • Not in relation to an issue designed prima facie for tax avoidance
Resident for determining tax liability of NR (Form 34D)	Transaction undertaken or proposed to be undertaken by resident with NR		
Resident for his own tax liability (Form 34DA)	Transaction undertaken or proposed to be undertaken by resident and the value of which is INR 100 crores or more		
Resident or NR himself (Form 34EA)	Determination of whether a proposed arrangement is an impermissible avoidance arrangement under GAAR	Rs 10,000	<ul style="list-style-type: none"> • No pendency before tax authority/ Tribunal/ court • Non determination of FMV
PSUs (Form 34E)	<ul style="list-style-type: none"> • Transaction undertaken or proposed to be undertaken • Can file an application even if the issue is pending before the tax authority/ Tribunal 		<ul style="list-style-type: none"> • Non determination of FMV

Procedure on filing - Section 245R

Application

- ▶ Application to be filed in prescribed form along with filing fees
- ▶ Details of questions proposed and applicant's analysis to be provided
- ▶ Applicant permitted to **withdraw** application within **30 days** from the date of the application (practically, at the discretion of AAR)

Commissioner (CIT)

- ▶ Application forwarded to the jurisdictional CIT
- ▶ Where applicant is not assessed to tax, CBDT to designate a CIT within two weeks
- ▶ CIT to provide comments on the application
- ▶ AAR can call for tax records from the CIT, where required

Examination

- ▶ AAR examines the allowability of the application
- ▶ AAR may admit or reject the application
- ▶ Applicant to be given a reasonable opportunity to be heard before rejection

Procedure on filing - Section 245R

Hearing

- ▶ AAR can call for additional information, where necessary
- ▶ Additional facts/ questions can be admitted at the AAR's discretion
- ▶ AAR to hear applicant as well as the CIT
- ▶ Default in appearance by the CIT/applicant could result in an ex-parte order

Ruling

- ▶ AAR to endeavor to pronounce a ruling within six months (recommendatory)
- ▶ Ruling can be modified where there is a change in law or facts
- ▶ Rectification of order possible in the event of a mistake apparent on record
- ▶ Modification / rectification not possible after ruling has been given effect to

Appeal

- ▶ Writ petition can be filed before the High Court [Columbia Sportswear (SC) (346 ITR 161)]
- ▶ Special Leave Petition (SLP) can be filed before the Supreme Court if SLP raises substantial question of general importance or a similar question is already pending before the SC or good grounds are made or put up (Columbia Sportswear)
- ▶ Writ / SLP can be filed either by applicant or tax authorities

Other aspects

Does AAR has to follow, on a question of law, its earlier rulings at the time of disposing the subsequent ruling

- ▶ Earlier rulings to have persuasive value, AAR not bound by its earlier rulings

Can AAR reject application (post admission) as not maintainable during the proceedings under Section 245R(4)

- ▶ Yes – refer Alibaba.com Singapore E-Commerce Pvt Ltd (AAR No 877 of 2010)

Can assessment proceedings be completed pending disposal of application by AAR

- ▶ Provisions under the Act do not prevent AO from passing an order pending disposal of application by AAR – Practically, AO agrees to keep the proceedings in abeyance [Explanation 1 to Section 153]

Experience

- ▶ Time limit for disposing the application (6 months) only recommendatory; in some case applications filed in 2011 are still pending before the AAR
 - ▶ Over 500 pending cases before AAR as on 31 March 2015*
- ▶ Period for completion of assessment proceedings extended by the period in which the applicant was in AAR

Particulars	Date	Remarks
Return of income filed (FY 2011-12; AY 2012-13)	26 September 2012	
Original due date for completion of assessment	31 December 2014	21 months from the end of AY
Time period available to tax officer for completion of assessment (Oct 2012 to Dec 2014)	27 months (6+21 months)	From the date of ROI filing till the due date for assessment
AAR ruling received by the tax officer	August 2016	
Month of completion of assessment	27 months from August 2016, ie, November 2018	Since AAR filed before ROI and was pending will original due date of assessment, the total available to tax officer would be added post receipt of AAR order

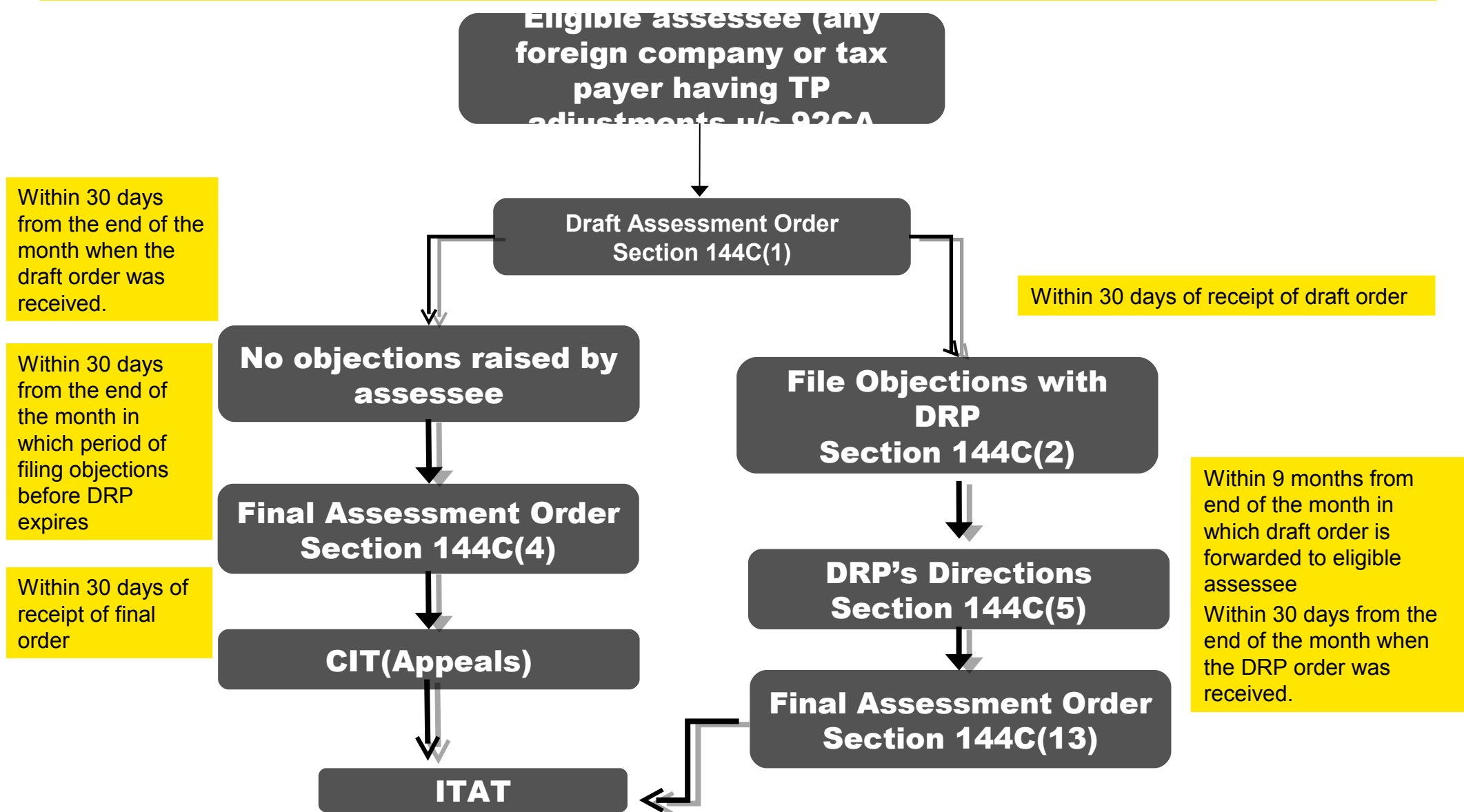
* Business Line news article dated 8 October 2015

Experience

- ▶ Part heard cases in situation of reconstitution of AAR to be heard again by the new chairman - additional time and cost for the Applicant
- ▶ Bench members not subject matter experts of international tax laws, conventions and practices
- ▶ Revenue authorities not forthcoming in quick disposal of the pending cases before AAR – seek multiple adjournments on unjustified grounds
- ▶ 2 additional benches of AAR has been constituted – one in New Delhi and one in Mumbai
 - ▶ However, the benches are not yet functional as the Chairman has not yet been appointed



DRP - Snapshot



DRP vis-à-vis CIT(A) process

Criteria	DRP	CIT(A)
Time frame	Within 9 months of filing objections	Can range from 2 to 3 years from filing appeal
Demand	No demand till final order of AO	Immediate demand pressure on assessee as soon as AO passes the order Recent CBDT circular provides that AO can grant stay of demand if 15% of tax demand is paid
Department's appeal	Cannot appeal against DRP's order (Amended by Finance Act 2016)	Can appeal before ITAT against CIT(A)'s order
Power to confirm, reduce or enhance	Yes	Yes
Power to remand for fresh assessment	No	No
Order	In most cases, summary order passed without cognizance to arguments	Likely to pass a speaking order after giving due cognizance to arguments/ facts

Other aspects

Can the following be challenged before the DRP:

- a. TDS order under section 201
- b. Penalty order under section 220/ 271(1)(c)
- c. Rates of taxes wrongly applied by AO
- d. Status of assessee wrongly determined by AO

- ▶ DRP can deal with the following:
 - ▶ Orders of assessment
 - ▶ Variation in the income or loss returned by the assessee

Whether re-assessment possible due to 'change in opinion' on new issue dealt with by DRP?

- ▶ No, any new issue dealt with by DRP for the first time during DRP proceedings to be considered as dealt with during original assessment [refer Lahmeyer Holdings GmbH (Delhi HC) (376 ITR 70)]

Can AO issue final order instead of draft order (say in case the issue is clearly covered by a SC decision against the assessee)?

- ▶ No, such order of the AO is without jurisdiction [Zuari Cement Limited (Writ Petition No 5557 of 2012) (AP HC) – SLP preferred by the revenue dismissed by the SC; International Air Transport Association (Writ Petition No 351 of 2016)]

Other aspects

Whether DRP route available in cases where the assessee (having TP adjustment u/s 92CA) intends to file objections before DRP only on corporate tax adjustments?

- ▶ Technically, DRP route should be available as the assessee having TP adjustment u/s 92CA qualifies to be an eligible assessee
 - ▶ Practically, advisable that the taxpayer does also object to variation arising due to transfer pricing

Whether DRP route available in case where AO passes final order under 92C(4) with TP adjustment without reference to TP officer under 92CA(1)?

- ▶ No, DRP route may not be available [refer Pankaj Extrusion Ltd v ACIT (2011) (Gujarat HC) [198 Taxman 6]; contrary ruling of Chennai Tribunal in the case of Visual Graphics Computing Services (India) (P.) Ltd. (2012) [15 ITR 393]

Experience

- ▶ Generally, the AO's order is upheld by the DRP
- ▶ Summary orders are passed by DRP without cognizance to facts and arguments of the assessee
- ▶ Limited time is provided to the assessee for hearing the case
- ▶ DRP members reluctant to take bold positions
- ▶ If tax department is in appeal on a particular issue, DRP (in most cases) reluctant to pass order favorable to the assessee

MAP



MAP - Overview

Generally, Article 25 contained in DTAA provides for MAP

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MAP is an alternate mechanism

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- ▶ for the resolution of international tax and transfer pricing disputes which are not in accordance with tax treaty
- ▶ Through intervention of Competent Authority (CA) of each state

Relief through MAP possible irrespective of remedies available under domestic tax laws

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Article 25(5) of OECD Model Convention 2010, provided for an arbitration mechanism to supplement MAP where agreement is not reached within 2 years from the presentation of the case to CA

▶ A

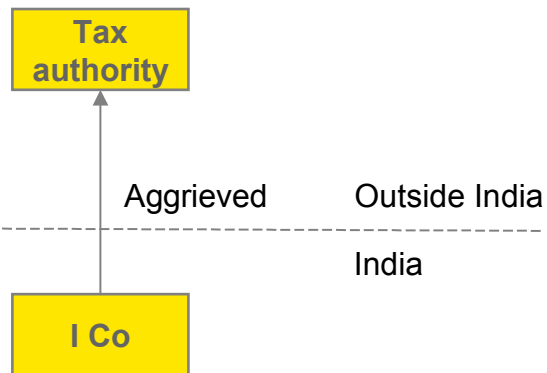
Treaties typically incorporate a time-limit for initiation of MAP procedures –

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- ▶ For instance, under the India - US treaty, MAP procedures are required to be initiated within 3 years of Revenue action leading to the MAP application
- ▶ However no time limit for completion of MAP

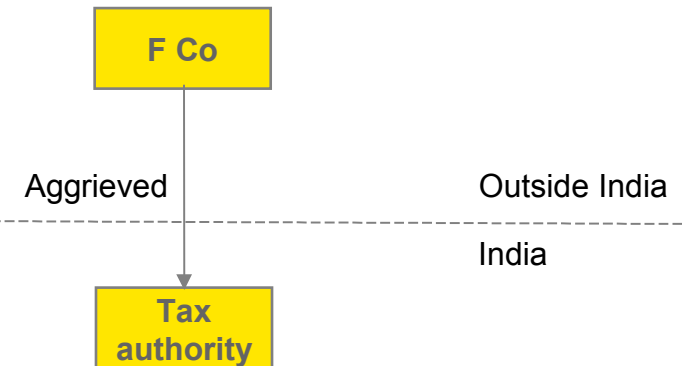
MAP - Indian Rules

Rule 44G (Outgoing MAP)



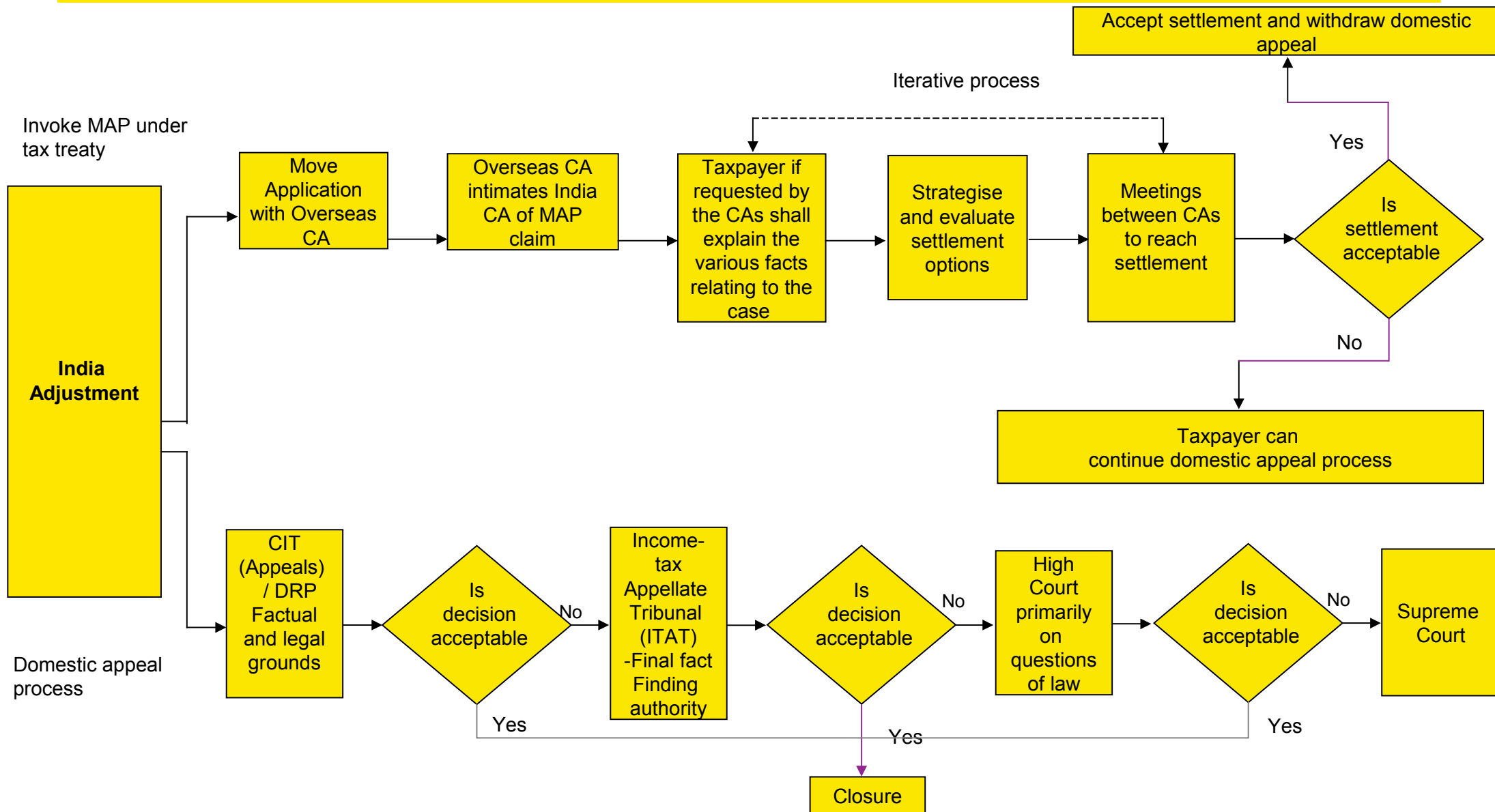
- ▶ Resident assessee aggrieved by action of tax authority outside India
- ▶ Such action is not in accordance with the agreement with such other country outside India
- ▶ May make an application to CA in India to invoke MAP
- ▶ Application to CA in Form 34F

Rule 44H (Incoming MAP)



- ▶ NR assessee aggrieved by action of tax authority in India
- ▶ Such action is not in accordance with the agreement of such country outside India with India
- ▶ Indian CA receives a reference from CA outside India
- ▶ Indian CA shall call for and examine the relevant records to give response to foreign CA
- ▶ Indian CA shall endeavour to arrive at a resolution

Process of resolution



MAP vis-à-vis domestic appeal process

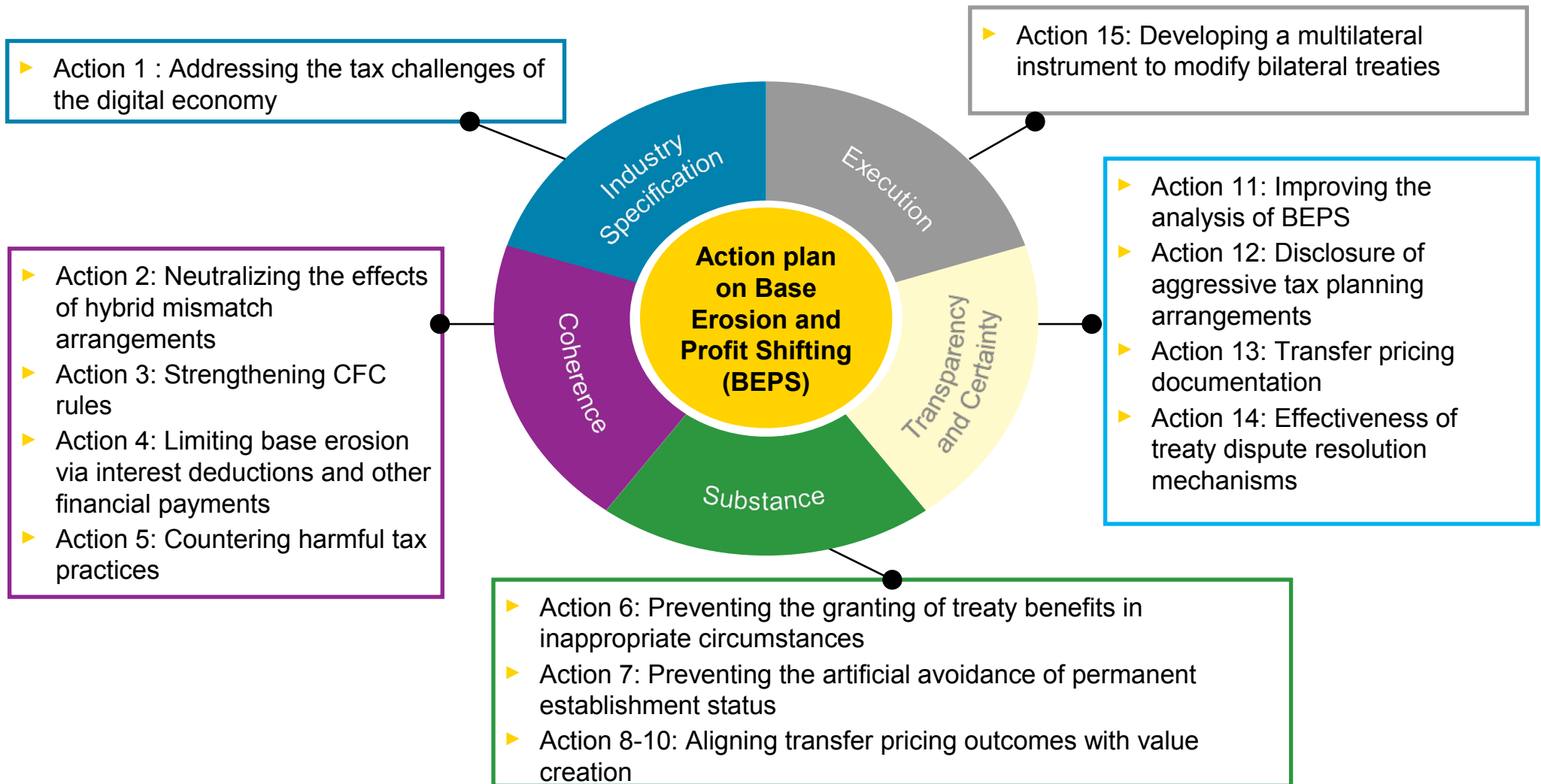
Criteria	MAP	Appeal
Time frame	Generally 3 to 5 years [MAP can also be filed against a non-appealable order eg: order u/s 195(2)]	Can range from 12 to 15 years
Approach	More scope for negotiation/compromise. CAs could agree on a “middle path”	Legalistic approach, no negotiations
Taxpayer involvement	At the discretion of CA	Significant involvement
Binding Nature	Binding on Revenue; Taxpayer need not accept if detrimental, can continue with domestic tax law appeal	Binding, but sequential appeals can be made to higher judicial authorities
Double tax mitigation	Possibility of avoiding double tax impact through correlative relief	Double tax exposure if appeal is against Taxpayer; correlative relief to be separately pursued
Collection of taxes	MOU for suspending collection of taxes (eg USA, UK)	Stay of demand at the discretion of the Revenue and Appellate Authorities
Finality	Greater chance of reaching finality, decision of CA binding on Revenue	Revenue can prefer appeal if first-level appeal is in Taxpayer’s favor

Indian MAP Experience

- ▶ Mostly MAP cases settled with US, Japan and UK
- ▶ MAP cases mainly categorised into Information Technology enabled services (“ITeS”), IT/ Software Development Services (“SWD”), Research & Development (“R&D”) services & PE
- ▶ India signed a framework agreement with the USA in January 2015. The agreement target to settle 200 MAP cases
- ▶ Commitment to resolve both the appropriate cost plus markup as well as the related cost base on which the mark up is applied
- ▶ Till January 2016 over 100 MAP cases were resolved
- ▶ India and US CAs met in first week of April 2016 in order to resolve more MAP cases in IT/ ITeS sector
- ▶ Significant delay in reaching conclusion (ie, no time limit)
- ▶ MAP resolution limited to the determination of principle issues, leaves income computation to tax officers

To resolve the above mentioned issues, OECD had suggested certain guidelines (which are discussed in detail in subsequent slides) in Action Plan 14 for making the MAP process more effective and efficient

BEPS action plan - changes to the international tax landscape



Overview of Action 14

BEPS Action 14

Improving the effectiveness of dispute resolution mechanism

Agreed Minimum Standard (MS)	Recommends Best Practices (BP)	Commitment to mandatory binding arbitration
<ul style="list-style-type: none">• MS designed with three objectives <ol style="list-style-type: none">1. Implement treaty obligation (i.e. Article 25) in good faith2. Ensure domestic administrative procedures do not block MAP access3. Ensure Taxpayers can access MAP when eligible <ul style="list-style-type: none">• Peer review mechanism to monitor implementation of mandatory standards.	<ul style="list-style-type: none">• Complements the MS• Have more subjective or qualitative character that cannot be readily monitored; or• Not all OECD and G20 countries have committed to it	<ul style="list-style-type: none">• 20 Countries have agreed to adopt mandatory binding arbitration (Eg – USA, UK, Australia, etc)• India is not one of them• None of India's treaties have an arbitration clause• MS only requires India to state its position as regards arbitration

Related Best Practice

Ensure taxpayers can access MAP when eligible

B1

Countries should include provisions in tax treaties regarding obligation of the other country to make appropriate TP adjustments if such adjustment is made in one country to reflect ALP

B2

Publish MAP agreements reached under Art. 25(3) on an anonymous basis, for encouraging consistent application of tax treaties and prevention of future disputes

B3

Develop global awareness of the audit functions involved in international matters

B4

Implement BAPA programs, to provide tax certainty and prevent TP disputes

B5

Implement procedures for multi-year resolution through MAP of recurring issues on similar facts and circumstances

B6

Ensure appropriate measures to suspend collection procedures while a case is pending in MAP

B7

MAP to be available as an option regardless of remedies under domestic law

B8

Explain relationship between MAP and domestic law administrative and judicial remedies in published MAP guidance

B9

Published MAP guidance should assist bona fide taxpayers to file for MAP relief for adjustments permitted under domestic law of DTAA partner

B10

MAP guidance should provide guidance on the consideration of interest and penalties in the MAP

B11

MAP guidance should provide guidance on multilateral MAPs and APAs

Case Studies

Can a company, after accepting MAP agreement, take benefit of a SC decision passed in the case of another assessee?

- ▶ Applicant to consider filing a rectification application u/s 154 for rectification of the order based on SC decision
 - ▶ It can be argued that once the applicant accepts the view taken by CA, he is estopped from taking a different view
- ▶ Applicant may also approach CA for re-initiating MAP in light of SC decision
- ▶ Applicant can also evaluate constitutional remedies (Writ petition/ SLP)

Whether MAP possible for cases where F Co 1 withholds tax in India on sale of shares of I Co to F Co 2?

- ▶ Technically, yes
- ▶ However, practically, Indian CA do not entertain any MAP till such time there is an order which is not in accordance with DTAA though Instruction No. 12/2002 dated November 01, 2002 provides otherwise
- ▶ Indian CA always take a position that they will not judge what the courts have to judge
- ▶ The recent trend in Indian CA is not of settlement but surrender and pay taxes



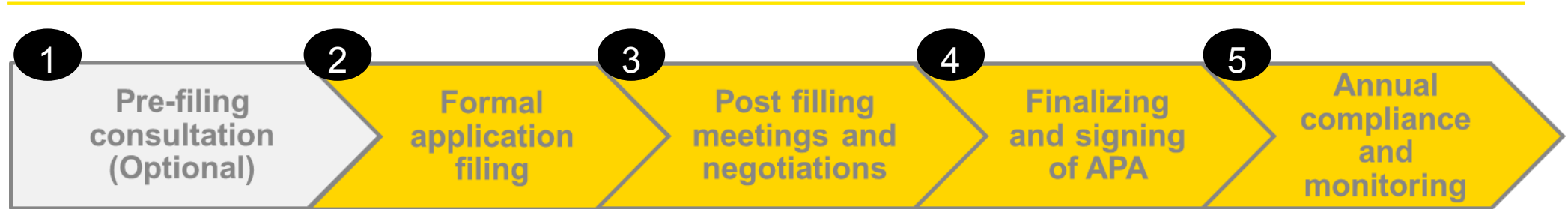
APA overview

- ▶ APA - an agreement between CBDT and the applicant, with the approval of the CG for:
 - ▶ determining the ALP; or
 - ▶ specifying the manner in which ALP has to be determined for an international transaction
- ▶ Binding on both taxpayer as well as tax authority, except in case of change in law/ facts
- ▶ Eligibility – Any person who undertakes an international transaction or contemplates to undertake an international transaction
 - ▶ **Thus, APA option is not available for SDT**
- ▶ APA can be entered into for a period of 5 consecutive years and past years (upto 4 years) can be covered under roll back
 - ▶ Rollback available for transactions covered under APA as mentioned in Form 3CED;
 - ▶ Rollback years will include four years preceding the first year of the APA covered period
- ▶ **Conditions for rollback**
 - ▶ ROI for the relevant rollback year has been furnished before the due date
 - ▶ Form 3CEB for the relevant year has been filed
 - ▶ Rollback application to be requested for all eligible four years in Form 3CEDA

APA overview

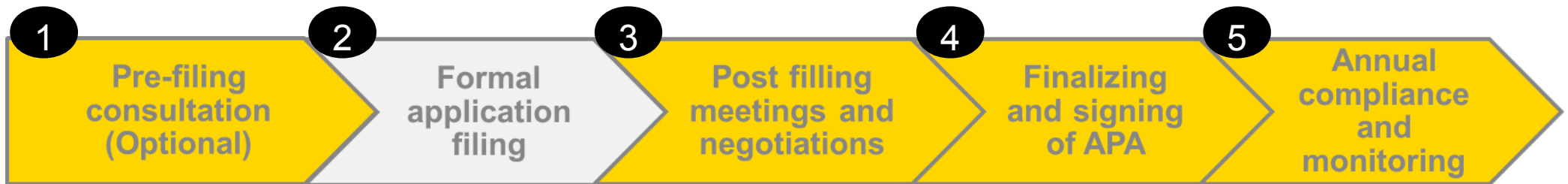
- ▶ Fee amounting to INR 5 lakh is paid and proof of payment furnished (this fee is in addition to the APA application fee)
- ▶ **Rollback provisions not applicable if:**
 - ▶ Determination of ALP of the covered transaction for the rollback year was subject matter of appeal with the ITAT and the ITAT has passed an order disposing off such appeal at any time before signing the APA
 - ▶ It has the effect of reducing the total income or increasing the losses as declared in the ROI
 - ▶ Manner of arriving at the ALP for the rollback years will be same as is agreed for the covered APA years
 - ▶ **Types of APA**
 - ▶ Unilateral APA (UAPA)
 - ▶ Bilateral APA (BAPA)
 - ▶ Multilateral APA (MAPA)
- ▶ CBDT had issued FAQs for clarifying various issues related to APA

APA Process



- ▶ Eligible taxpayer willing to enter into APA may request for pre-filing consultation, by filing Form 3CEC to the PCIT
- ▶ APA authorities will hold pre-filing consultation upon receipt of the request. **In case of bilateral or multilateral APA, CA of India will be involved in the prefilling**
- ▶ Pre-filing consultation among other things, determine the scope of the agreement, identify transfer price issues, discuss broad terms of the agreement etc.
- ▶ **CBDT in the recent notification dated 14 March 2015 has made pre-filing process and obtaining letter of understanding optional before filing APA application**
 - ▶ Eligible taxpayer can now file an application for APA without requesting for a pre-filing consultation with the APA authorities

APA Process

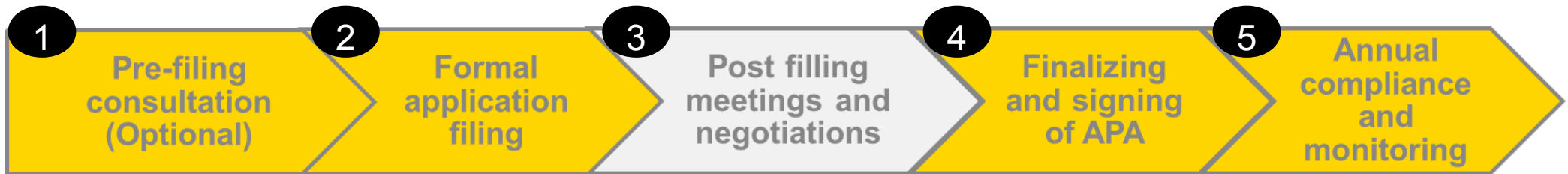


- ▶ Eligible taxpayer may file an application in Form 3CED along with the requisite fee

Type of APA	Person to whom APA application has to be submitted
Unilateral	PCIT
Bilateral and Multilateral	CA in India

- ▶ Application for APA should be accompanied by the following details:
 - ▶ Details of the applicant
 - ▶ Functional and industry analysis
 - ▶ Transfer pricing background
 - ▶ Impact of the proposed transfer pricing method

APA Process



- ▶ Preliminary processing of application to ensure it is not defective and complete
- ▶ Once the application is accepted, APA authorities will hold meetings with the applicant (**including onsite visit**) and undertake necessary inquiries
- ▶ Applicant may request for an amendment to its application at any time before finalization
 - ▶ Amendment may be allowed by the PCIT/ CA if such amendment does not have the effect of altering the original application
- ▶ Applicant may also convert a unilateral APA application into bilateral or a multilateral APA
- ▶ APA team and the CA empowered to hold meetings, call for additional documents/ information, visit applicant's office and make necessary enquiries
 - ▶ To ensure proper examination of critical assumptions, functional analysis, etc

APA Process



- ▶ Draft agreement prepared between the applicant and the PCIT/ CA and sent for approval to CG
- ▶ After the approval from the Central Government, the CBDT enters into agreement with the applicant
- ▶ A copy of the agreement is sent to the Income Tax Officer having jurisdiction over the applicant

APA Process



- ▶ Taxpayer who has entered into APA has to file annual compliance report in Form 3CEF to the PCIT for each year covered in the agreement
 - ▶ within a period of 30 days of the due date of filing of return or
 - ▶ within 90 days of entering into an agreement, whichever is earlier
- ▶ Compliance audit would be conducted by the jurisdictional TPO to ensure compliance with the terms of the APA
- ▶ TPO has to submit the report to the PCIT/CA
- ▶ **Taxpayer who has opted for the APA would not be required to file Form 3CEB or maintain TP documentation for transactions covered by the APA**
 - ▶ Due date for furnishing return of income would undergo a change

Indian APA rules - Procedure for BAPAs/ MAPAs

- ▶ Negotiation between the CAs shall be in accordance with the provisions of the tax treaty
- ▶ Provisions of Article 9(2) – Pre-requisite for bilateral APAs (BAPA)/ multilateral APAs (MAPA)
- ▶ The process shall not be initiated unless the AE(s) outside India has initiated APA process with the CA in the other country
 - ▶ Evidence of furnishing application in other country or tentative date of filing application to be provided at filing stage
- ▶ The applicant shall not be entitled to be part of discussion between the CAs
 - ▶ Applicant however permitted to have discussions with Indian CA
- ▶ CAs to formalize the MAP arrangement
- ▶ Applicants may continue with process of entering into UAPA in case of failure of BAPA/ MAPA

APA Benefits & Considerations

Benefits

- ▶ Helps obtain certainty on a prospective basis and on earlier years under the rollback scheme
- ▶ Prevents double taxation in case of bilateral agreement
- ▶ Avoids potential audit along with compliance, litigation and penalty costs
- ▶ Deals with real time issues as well as complex matters which might otherwise be difficult to resolve
- ▶ Addresses contentious issues in “open years”

Considerations

- ▶ Potentially high up-front investment costs in securing an APA – i.e., filing fee, management time, external advisors’ costs
- ▶ Time intensive process especially where multiple jurisdictions are involved
- ▶ Confidentiality concerns on information that is shared

APA experience

- ▶ Statistics of applications filed till date:



- ▶ Bilateral APAs filed for transactions with UK, Japan, Switzerland, Australia and Sweden
- ▶ Times consuming process – APA team under-staffed (may take around 2-3 years to obtain UAPA and 3-4 years to obtain bilateral APA)
- ▶ Site –visits by APA authorities
 - ▶ Questionnaire directly with business team/ admin staff about their roles and responsibilities and mapping the same with their qualifications
 - ▶ In-depth checking of the premises/ infrastructure to identify signs of additional facts/information not disclosed in the application

Case study

Company A enters into an APA for the period of 5 years. After 2 years Company A merges into Company B. Will the APA will also be applicable on Company B?

- ▶ No, FAQs issued by CBDT provide that the APA is binding on the assessee who has entered into an APA in relation to covered transaction. In the above Company A no longer exist hence APA wouldn't be binding on Company B

Safe Harbor Rules



Safe Harbor Rules ('SHR') - Overview

- ▶ Safe harbor in a transfer pricing regime applies to a defined category of taxpayers or transactions,
 - ▶ Relieves eligible taxpayers from certain obligations otherwise imposed by general TP rules
 - ▶ Mechanism under which in certain circumstances tax authorities accept the TP declared by taxpayer without undertaking detailed audit
- ▶ Common practice in several countries (e.g. United States, Australia, Brazil, Mexico etc.)
- ▶ Offer several benefits to both taxpayers and tax administrations:
 - ▶ **Taxpayers:** Relieve from burdensome compliance obligations, certainty and boost investment climate
 - ▶ **Tax administrations:** Administrative simplicity, focus on critical issues

Applicability of SHR for international transactions (Rule 10TC)

Eligible taxpayer can opt for SHR for the following international transactions with AE:

- ▶ Provision of SWD/ ITES/ KPO services;
 - ▶ Advance of intra-group loan;
 - ▶ Provision of corporate guarantee;
 - ▶ Provision of contract R&D services relating to IT/ generic pharmaceutical drugs; and
 - ▶ Manufacture and export of core/ non-core auto components
-

SRH - Overview

Non applicability of SHR (Rule 10TF)

International transaction with AEs located in;

- ▶ Country or territory notified under section 94A or
- ▶ No tax or low tax country or territory i.e. income tax rate less than 15%

Eligible taxpayers for International transactions

- ▶ Except for international transactions involving loan and guarantee, eligible taxpayer would be the one who assumes insignificant risks in the international transaction
- ▶ Factors for Indian counterpart to be an provides as an eligible taxpayer assuming **insignificant risk**:
- ▶ Foreign AE performs significant economic functions including critical functions and taxpayer carries out the work assigned
- ▶ Capital, funds and economically significant assets are provided by Foreign AE
- ▶ Foreign AE controls and supervises activities carried out by the taxpayer
- ▶ Taxpayer does not assume economically significant realized risks
- ▶ Taxpayer does not have any legal or economic ownership of intangibles generated or outcome of any intangibles generated in the course of rendering services
- ▶ Factors to be determined primarily by analyzing conduct of the parties and not merely contractual terms

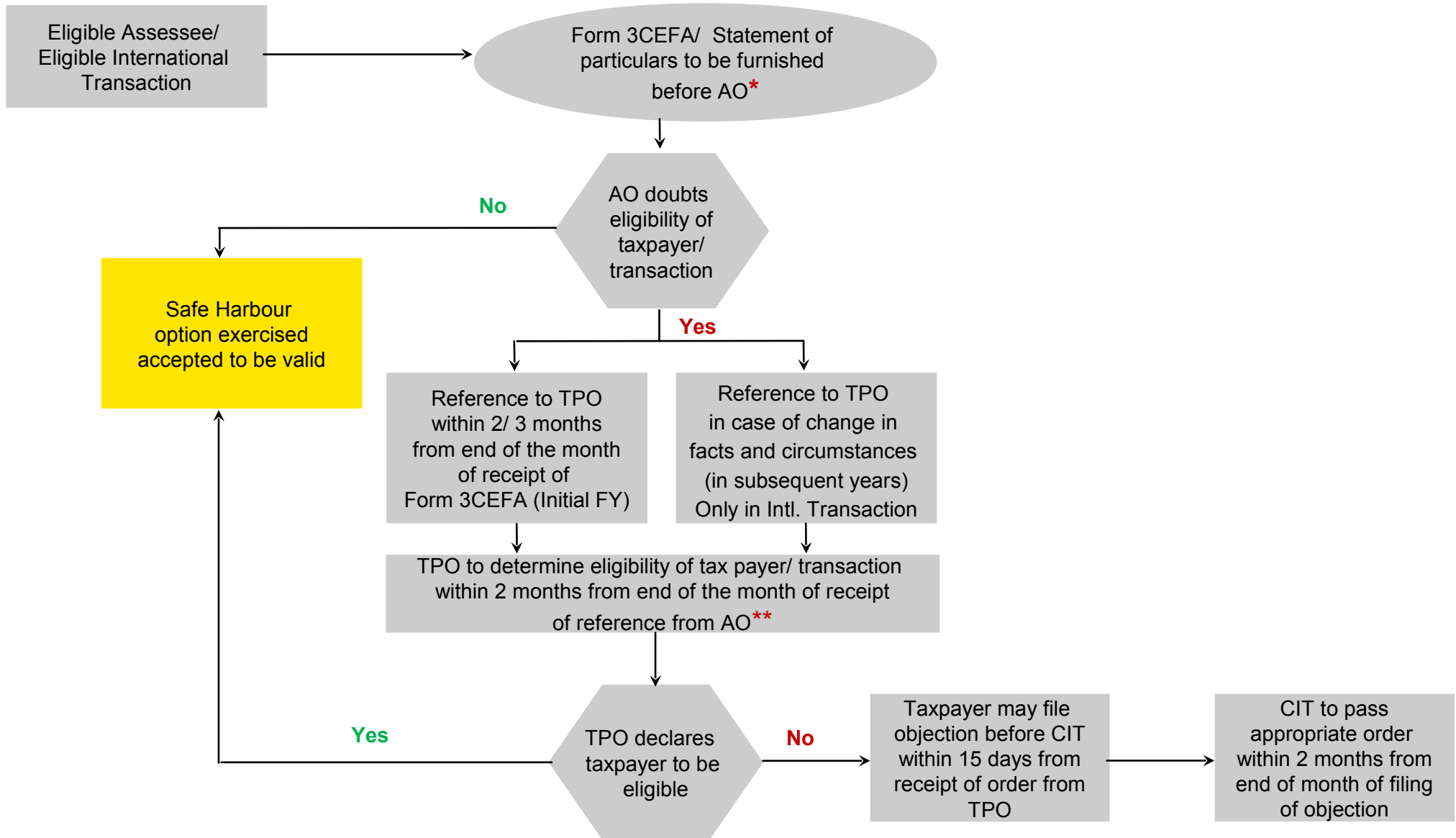
SRH - Overview

- ▶ If safe harbour opted, taxpayer not entitled to make any comparability adjustments nor avail benefit of tolerance range [Rule 10TD(4)]
- ▶ **Compliance requirements:**
- ▶ Form 3CEFA to be furnished before due date of filing ROI;
- ▶ Option exercised to remain in force for lesser of the period specified in Form 3CEFA or 5 years, unless option held to be invalid or taxpayer opts out; and
- ▶ Taxpayer required to comply with TP documentation & Form 3CEB filing requirements even if he opts for the safe harbour rules.
- ▶ Relatively simplified audit process prescribed for taxpayers opting for safe harbour in respect of eligible transactions

SRH - Notified transaction margins

Sl.No	Eligible International Transaction	Transaction Value	Safe harbour ceilings
1	SWD services / ITES	INR 500 crores and below	Operating Profit Margin ("OPM") is 20% or more
		Above INR 500 crores	OPM is 22% or more
2	KPO services	No limit prescribed	OPM is 25% or more
3	Intra group loans to wholly owned subsidiary	Value of loan does not exceed INR 50 crores	Interest rate \geq base rate of SBI on June 30 of the relevant year plus 150 basis points
		Value of loan exceeds INR 50 crores	Interest rate \geq base rate of SBI on June 30 of the relevant year plus 300 basis points
4	Contract R&D	No limit prescribed	OPM is 29%/ 30% or more
5	Explicit corporate guarantee to a wholly owned subsidiary	Amount guaranteed does not exceed Rs 100 crores	Commission or fee to be 2% or more per annum of the amount guaranteed
		Amount guaranteed exceeds Rs 100 crores	Commission or fee to be 1.75% or more per annum of the amount guaranteed
6	Manufacture/and export of core auto components	No limit prescribed	OPM is 12% or more
7	Manufacture and export of non core auto components	No limit prescribed	OPM is 8.50% or more

SRH - Compliance Procedure



Limitation/ challenges

- ▶ Factors which dis-incentivize taxpayers from participating in safe harbor program -
 - ▶ Overlapping categories between SWD/ ITeS/ KPO services and R&D in the area of software/ ITES/ KPO services respectively
 - ▶ 20 – 30 percent safe harbor rates – Inconsistent with the arm's length rates based on comparables in these domain
 - ▶ Such high rates increases the risk of double taxation for parents/ affiliates of existing businesses in their home jurisdictions
 - ▶ Low threshold for guarantee with high commission rate fails to encourage guarantee transactions

Safe Harbour Rules need to be revisited and tinkered to attract taxpayers

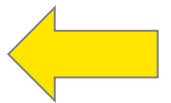
Thank You

This preliminary document expresses personal views of the speaker and the information and opinions contained in this document are derived from public and private sources which are believed to be reliable and accurate but which, without further investigation, cannot be warranted as to their accuracy, completeness or correctness.

Residential status for AAR

When one should determine the residential status of a NR for application before AAR

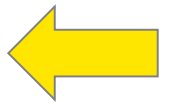
- ▶ Residential status in the FY immediately preceding the FY in which the application is made
 - ▶ Monte Harris vs CIT [218 ITR 413] (AAR)



Advance ruling for proposed transactions

Can 'hypothetical' questions/ questions based on mere transaction 'intention' be raised?

- ▶ No, refer CTCL Overseas Corporation (85 CCH 242) (AAR); Trade Circle Enterprises LLC (361 ITR 673) (AAR)



AAR - Significance of the word 'already pending'

Whether filing of ROI is to be considered as question already pending before IT authority?

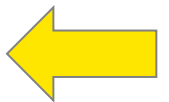
- ▶ 2 views were possible
- ▶ View 1 – Application before AAR not maintainable once the ROI is filed
 - ▶ SEPCO III Electric Power Construction Corporation (AAR) (340 ITR 225), GTB Invest ASA (AAR) (80 CCH 408), Wavefield Inseis ASA (AAR) (343 ITR 136), Net App BV (AAR) (347 ITR 461), Red Hat India Private Ltd (AAR) (349 ITR 398)
- ▶ View 2 – Mere filing of ROI should not create an embargo on maintainability; but once a notice is issued, bar on maintainability would stand attracted
 - ▶ Hyosung Corporation, In re (AAR) (357 ITR 123), Mitsubishi Corporation, In re (AAR) (360 ITR 0704), LS Cable & Systems Ltd, In re (AAR) (362 ITR 0018)
- ▶ SC decision in favour of view 2 in the case of Sin Oceanic Shipping ASA Norway (269 CTR 015)

Whether pendency of proceedings or order passed under section 201 (due to failure in compliance with Section 195) could be considered as 'already pending'?

- ▶ No, refer Groupe Industrial Marcel Dassault (AAR) (340 ITR 353); Burmah Control Plc (AAR) (305 ITR 375)

Whether a ruling can be declined on the ground that the amalgamation proceedings are pending under the Companies Act?

- ▶ No, refer Star Television Entertainment [321 ITR 1]



APA filing fees

- ▶ Fees vary in the range of INR 1 Million to INR 2 Millions based on the value of international transaction as tabulated below:

Value of International Transactions for which APA is proposed	Filing fees
< INR 1 Billion (approximately USD 17 Millions)	INR 1 Million (approximately USD 17,000)
INR 1 Billion to INR 2 Billions (approximately USD 17 to USD 35 Millions)	INR 1.5 Millions (approximately USD 26,000)
> INR 2 Billions (approximately USD 35 Millions)	INR 2 Millions (approximately USD 35,000)

- ▶ In addition to the above, fees of Rs 5 lakhs is payable for rollback period

