

Recent Transfer Pricing Developments

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Setting the context

Old world

- Compliance driven
- Reliance on local documentation
- One-sided approaches
- Protracted litigation



New world

- Increased transparency
- Local file critical; but important to align with global documentation
- Focus on value creation
- Increased MAP/APA

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Secondary Adjustment

1



Secondary Adjustment – the law

- Finance Act, 2017 introduced the concept of secondary adjustment by way of insertion of a new section 92CE to the Act.
- As per section 92CE of the Act,

*“secondary adjustment means an adjustment in the books of account of the assessee and its associated enterprise to reflect that the actual allocation of profits between the assessee and its associated enterprise are consistent with the transfer price determined as a result of primary adjustment, thereby removing the **imbalance between cash account and actual profit** of the assessee.”*

Clarifications

To be introduced with effect from April 1, 2018 (ie AY 2018-19)

Sr. No	Provisions	Summary of the provisions
1	Section 92CE(1) of the Act states that a secondary adjustment shall be made only in case of the following mentioned primary adjustments:	<ul style="list-style-type: none">• Suo moto adjustment in the return of income; or• Acceptance of adjustment made by the assessing officer; or• Determination in an APA; or• Adoption of safe harbour rule; or• Resolution under MAP
2	Proviso to section 92CE(1) states:	<ul style="list-style-type: none">• No secondary adjustment is required if:<ul style="list-style-type: none">– The primary adjustment does not exceed INR 10 million and– If the primary adjustment is made in respect of an AY commencing on or before the 1st day of April, 2016

Clarifications

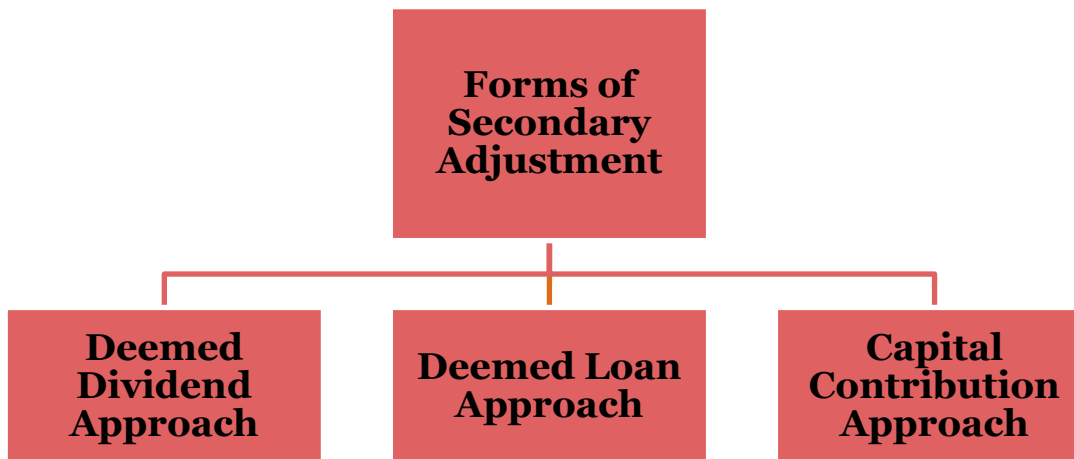
Sr. No	Provisions	Summary of the provisions
3	Section 92CE(2) of the Act:	<ul style="list-style-type: none">• Secondary adjustments introduced where primary adjustments result in increase in total income or reduction in loss• Excess money available with its AE as a result of primary adjustment, if not repatriated to India within the prescribed time, to be treated as an interest bearing advance
4	Rule 10CB of the Income Tax Rules, 1962 – Computation of interest income pursuant to secondary adjustments	<ul style="list-style-type: none">• Excess money to be repatriated to India within 90 days from the following:<ul style="list-style-type: none">○ Due date of filing of the return of income (ROI) – in case of a <i>suo moto</i> adjustment and Safe Harbour○ Date of filing of the ROI (or modified return) – in case of an APA○ Date of ROI – in case of MAP○ Date of Tax officer's order or Appellate authority's order – in case of acceptance by the taxpayer

Clarifications

Sr. No	Provisions	Summary of the provisions
5	Interest rate (for excess money which is not repatriated within the time limit)	Shall be computed as follows: <ul style="list-style-type: none">• For an international transaction dominated in INR - one year MCLR of SBI as on 1st April of the relevant previous year plus 325 basis points• For an international transaction dominated in foreign currency - six month LIBOR as on 30th September of the relevant previous year plus 300 basis points

Global Practice/OECD

- Article 9 of Model Tax Convention does not deal with the issue of secondary adjustment
- However, the OECD TP guidelines recognizes the concept of secondary adjustment in the following forms:



Global scenario	
<i>Dividend</i>	<i>Loan</i>
USA	UK proposed
Korea	
Germany	
South Africa	
France	

Practical Issues in the form of FAQs

Sr. No	Provisions	Summary of the provisions
1	Will secondary adjustment be made if an appellate authority upholds the primary adjustment?	<ul style="list-style-type: none">• Secondary adjustment need not be made by the Assessee till the issue reaches finality and the decision is rendered by an authority which could not be further reviewed or appealed by the Assessee• Order by Supreme Court – deemed acceptance?
2	When is secondary adjustment required to be made in case an Assessee accepts a primary adjustment at a later point in time after assessment or an appeal?	<ul style="list-style-type: none">• Adjustment is required to be made in the books of accounts, however, it would not be possible to revise the books of accounts closed in the earlier years• How would the entry of the receivable be treated?• Difficult to force an adjustment in the books of the AE

Practical Issues in the form of FAQs

Sr. No	Provisions	Summary of the provisions
3	How can secondary adjustment be made in a case when primary adjustment is made on all international transactions aggregated under TNMM?	<ul style="list-style-type: none">• Possibility is to apportion the adjustment amongst the AEs, however there can be a situation where the AEs may refuse to pay
4	Would a corresponding adjustment be available to the AEs in respect of a secondary adjustment made?	<ul style="list-style-type: none">• As per OCED model convention, corresponding adjustments would be available only in respect of primary adjustments
5	When can the order said to be made by the AO?	<ul style="list-style-type: none">• Order passed by the AO;• Directions passed by the DRP/CIT(A)

Section 94B – Limitation of Interest deduction

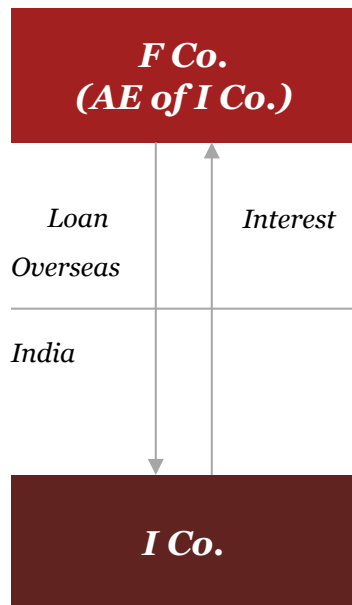
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Section 94B – Provisions

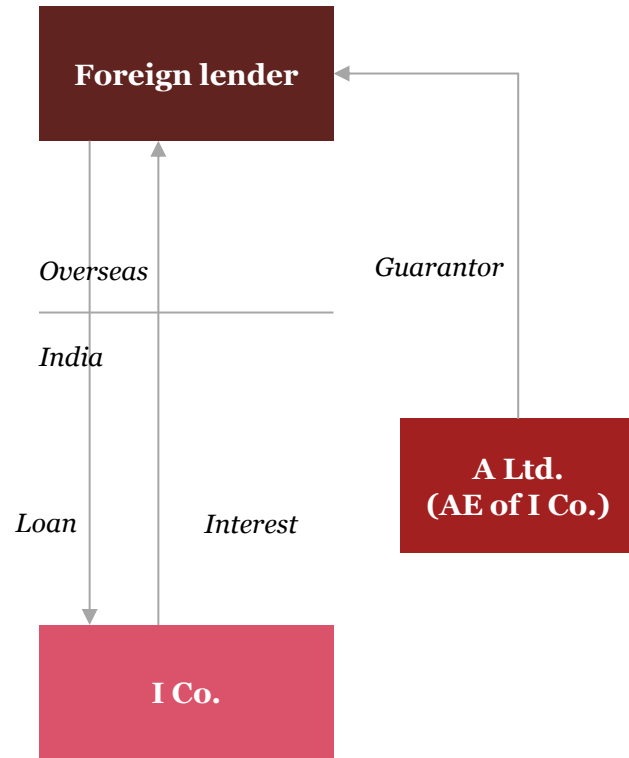
Applicability	<ul style="list-style-type: none">• Introduced vide Finance Act 2017; Applicable from 1 April 2017• ‘Anti-abuse’ provisions in line with BEPS Action Plan 4
Conditions triggering Section 94B	<p>Condition 1</p> <ul style="list-style-type: none">• Borrower is an <i>Indian Company or PE of a foreign company</i> <p>Condition 2</p> <ul style="list-style-type: none">• Incurs any expenditure by way of <i>interest or of similar nature</i> exceeding INR 1 crore which is <i>deductible</i> in computing income chargeable under the head “<i>Profits and gains of business or profession</i>” <p>Condition 3</p> <ul style="list-style-type: none">• In respect of any debt issued by a <i>non-resident</i>:<ul style="list-style-type: none">- being an AE; or- a third party lender (non-AE) but where the <i>AE provides implicit or explicit guarantee</i> to such lender or <i>deposits a corresponding and matching amount</i> of funds with the lender• Not applicable to borrowers engaged in banking or insurance business
Amount of disallowance ('excess interest')	Lower of:- <ul style="list-style-type: none">• <i>Total interest</i> paid or payable in excess of 30% of EBITDA; and• Interest paid or payable to AEs
Carry forward/set off	<ul style="list-style-type: none">• Interest disallowed can be carried forward and set-off up to eight assessment years

Section 94B – Illustration

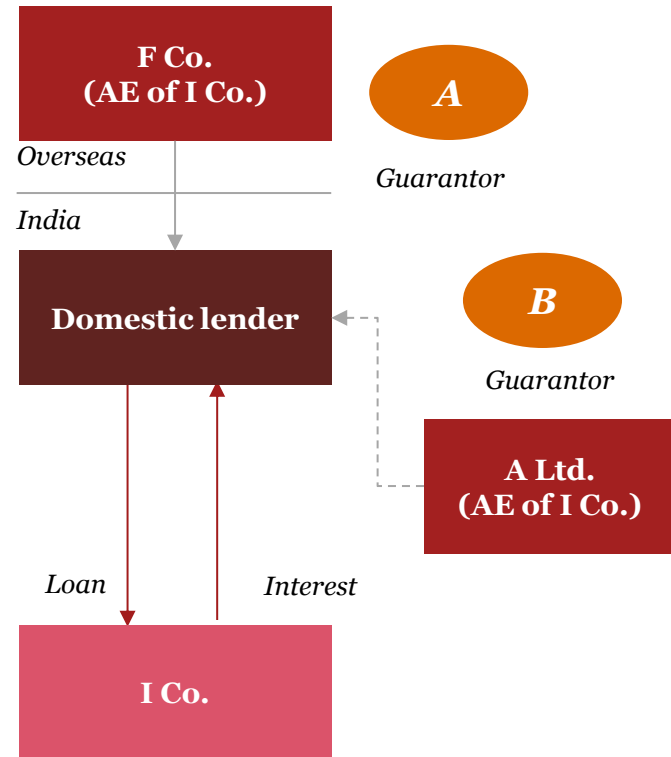


Sr. No.	Particulars	Reference	INR in crs
A	Interest expenditure on Loan taken from Non-resident AE	A	100
B	Interest expenditure on Loan taken from third party	B	50
C	Total Interest	[(A) + (B)]	150
D	EBITDA (Earnings before Interest, Taxes, Depreciation and Amortisation)	D	300
E	30% of EBITDA	D * 30%	90
F	Interest to be disallowed		
	Excess interest paid (150-90) or	[(C) – (E)]	60
	Interest paid to Non-resident AE	A	100
	whichever is lower (amount to be disallowed)		60

Debt issued by Non-resident



94B triggered



Arguably 94B not triggered since lender is a resident

BEPS v. Section 94B

<i>Parameter</i>	<i>BEPS Action Plan 4: Best practices</i>	<i>Section 94B</i>
Approach	Recommends interest to EBITDA ratio (10%30%) and supplements 'worldwide group ratio rule'	Proposed maximum threshold of 30%
Threshold for application	Recommended a de minimis monetary threshold to carve out entities which have low level of interest expenses, amount not specified	Interest payments to AEs must exceed INR 1 cr
Carry forward and carry backward of disallowed interest	Both carry forward and carry backward (unutilised capacity) is allowed, period not specified	Only carry forward is allowed for 8 years
Gross vs. Net interest	Net interest	Unclear, 'gross' basis
EBITDA	Based on taxable income	No specific mention. However, more likely to consider book profits as it refers to earnings and not 'income' as used in the Act
Capitalised interest	To be considered	No, as depreciation is an allowance
Exclusions	Specific rules to address issue raised by banking and insurance sectors. Also, public benefit projects are specifically excluded	Banking and insurance sector is excluded

Safe Harbour Rules (revised)

3



Revised Safe Harbour Rules...

The reduction in existing Safe Harbour ('SH') rates and changes to the specified circumstances are analysed below:

Sr. No	Eligible International Transaction	SHR – Post revision	SHR – Pre revision
1	Provision of: a) Software development services b) Information Technology (IT) enables services	OP/OE*: <ul style="list-style-type: none"> • $\geq 17\%$ where value of IT** \leq INR 1,000 mn • $\geq 18\%$ where value of IT $>$ INR 1,000 mn but \leq INR 2,000 mn *Operating profit/ Operating expense **International transaction	OP/OE: <ul style="list-style-type: none"> • $\geq 20\%$ where value of IT \leq INR 5,000 mn • $\geq 22\%$ where value of IT $>$ INR 5,000 mn
2	Provision of contract R&D services wholly or partly relating to: software development generic pharmaceutical drugs	<ul style="list-style-type: none"> • OP/OE $\geq 24\%$ where value of IT \leq INR 2,000 mn 	OP/OE: <ul style="list-style-type: none"> • $\geq 30\%$ in case of software development • $\geq 29\%$ in case of generic pharmaceutical drugs

...Revised Safe Harbour Rules...

Sr. No	Eligible International Transaction	SHR – Post revision	SHR – Pre revision
3	Provision of knowledge process outsourcing (KPO) services	Value of IT ≤ INR 2,000 mn, and OP/OE: <ul style="list-style-type: none"> • ≥ 24% - <i>if employee cost to OE is at least 60%</i> • ≥ 21% - <i>if employee cost to OE is 40% or more but less than 60%</i> • ≥ 18% - <i>if employee cost to OE is ≤ 40%</i> 	OP/OE ≥ 25%
4	Manufacture and export of: a)Core auto components b)Non-core auto components	<ul style="list-style-type: none"> • Core auto components ≥ 12% • Non-core auto components ≥ 8.5% 	

...Revised Safe Harbour Rules...

Sr. No	Eligible International Transaction	SHR – Post revision	SHR – Pre revision
5	Advancing intra-group loan (INR denominated)	<p>Interest rate not less than marginal cost of funds lending rate of SBI plus:</p> <ul style="list-style-type: none"> • 175 BPS, where CRISIL rating of AE is between AAA to A or equivalent • 325 BPS, where CRISIL rating of AE is BBB-, BBB or BBB+ or equivalent • 475 BPS, where CRISIL rating of AE is between BB to B or its equivalent • 625 BPS, where CRISIL rating of AE is between C to D or its equivalent • 425 BPS, where credit rating of AE is not available and the amount of loan advanced to the AE including loans to all AEs does not exceed INR 1,000 mn as on 31 March of the relevant PY 	<p>Base rate of SBI as on 30th June of the relevant PY plus:</p> <ul style="list-style-type: none"> • 150 BPS where the amount of loan is \leq INR 500 mn • 300 BPS where the amount of loan is $>$ INR 500 mn

...Revised Safe Harbour Rules...

Sr. No	Eligible International Transaction	SHR – Post revision	SHR – Pre revision
6	Advancing intra-group loan (foreign currency loan)	<p>Interest rate not less than 6 months LIBOR of relevant foreign currency plus:</p> <ul style="list-style-type: none"> • 150 BPS, where CRISIL rating of AE is between AAA to A or equivalent • 300 BPS, where CRISIL rating of AE is BBB-, BBB or BBB+ or equivalent • 450 BPS, where CRISIL rating of AE is between BB to B or its equivalent • 600 BPS, where CRISIL rating of AE is between C to D or its equivalent • 400 BPS, where credit rating of AE is not available and the amount of loan advanced to the AE including loans to all AEs does not exceed a sum of INR 1,000 mn as on 31 March of the PY 	

Country by Country Reporting & Master File

4



Country by Country Reporting (CbCR): Indian Regulations aligning with BEPS Action Plan 13

Master File - A global consistent overview

- Group organizational structure
- Description of global value chain
- Intangibles
- Financing activities
- Global Transfer pricing policies

Local File - Specific to country analysis

- Description of Inter-company transactions
- Comparability analysis
- Selection and Application of TP Method(s)
- Financial Information

CbCR - key data points for each group entity

- Main business activity
- Capital & Assets
- Revenue (AE & Non-AE), Profits, Taxes
- Number of Employees
- Tax jurisdiction

Master File & Local File to be filed with each tax jurisdiction

CbCR to be filed with tax jurisdiction of ultimate parent

CbCR mandatory if consolidated turnover > EUR 750 mn (approx. INR 5,632 Cr.)

CbCR to be used only for risk assessment; not for concluding audits

Section 286 inserted by Finance Act 2016 w.e.f April 2017



- Indian headquartered Multinational enterprises (MNEs) are required to file CbCR following OECD's final report on BEPS Action Plan 13.
- Indian subsidiaries of foreign MNEs are also required to furnish CbCR in India in specified instances.
- CbCR is to be filed by the due date for filing of income tax returns. Further, stringent penalties have been prescribed for non-filing/delayed filing/inaccurate filing of CbCR.
- The concept of a master file providing a high-level overview of an MNE's global transfer pricing practices has been introduced. Detailed rules are to be framed and are expected shortly.

Master file vs current Rule 10D requirement

Master file requirements	Master file	Rule 10D
Organisational structure		
– Legal & ownership structure & geographical locations	✓	✓
Description of MNE's business		
– Important drivers of business	✓	✗
– Group supply chain and main geographic markets	✓	✗
– Important service agreements between group (except R&D)	✓	✓ <i>Limited to relevant transactions</i>
– Contribution to value creation by entities within group	✓	✓ <i>Limited to relevant transactions</i>
– Business restructuring transactions (e.g., M&A)	✓	✓ <i>Limited to relevant transactions</i>
MNE's intangibles		
– Ownership, use and location + strategy for development	✓	✓
– Transfer pricing policies related to R&D & intangibles	✓	✗
– Any transfers of intangibles among associated enterprises	✓	✗
MNE's intercompany financial activities		
– Group financing, related and third-party	✓	✗
– Transfer pricing policies related to financing arrangements	✓	✗
MNE's financial and tax positions		
– Group's annual consolidated financial statement for financial year	✓	✓ <i>Covered in financial statements</i>
– Group's existing unilateral APAs and tax rulings related to the allocation of income between jurisdictions	✓	✗

Local file vs current Rule 10D requirement

Local file requirements	Local File	Rule 10D
Local entity		
- Management structure + local organisation chart (include heads of management , their reporting lines & location)	✓	✓ <i>Except reporting lines & location</i>
- Key competitors	✓	✗
- Business restructurings or transfers of assets (especially intangibles)	✓	✗
Controlled transactions		
- Description of materially controlled transactions	✓	✓
- Amount of intra-group payments and receipts	✓	✓
- Identification of AE and relationship shared	✓	✓
- Copies of all material intercompany agreements concluded by local entity	✓	✓
- Detailed comparability and functional analysis of the taxpayer and relevant associated		
- Most appropriate transfer pricing method for transaction & the reasons	✓	✓
- Tested party selected along with the reasons	✓	✓
- Summary of important assumptions made	✓	✓
- Reasons for performing a multi-year analysis	✓	✗
- Explanation of selected comparable uncontrolled transactions along with source	✓	✓
- Whether any comparability adjustments are performed	✓	✓
- Reasons for concluding that transactions were arm's length	✓	✓
- Financial information used in applying the transfer pricing methodology	✓	✓
- Copy of existing unilateral and bilateral/multilateral APAs and other tax rulings to which the local tax jurisdiction is not a party and which are related to controlled transactions described above	✓	✗

Local file vs current Rule 10D requirement

Local file requirements	Local File	Rule 10D
<i>Financial</i>		
– Annual local entity financial statements	✓	✓
– Reconciliation of financial data used and transfer pricing methodology	✓	✓
– Financial data for comparables used & the source of data	✓	✓

CbCR Template...

Table 1. Overview of allocation of income, taxes and business activities by tax jurisdiction

Tax Jurisdiction	Revenues	Profit (loss) before Income Tax	Income Tax Paid (on cash basis)	Income Tax Accrued – Current Year	Stated Capital	Accumulated Earnings	Number of Employees	Tangible Assets (other than Cash and Cash equivalents)

The details prescribed in India regulations are similar to that of Action point 13



...CbCR Template

Table 2. List of all the Constituent Entities of the MNE group included in each aggregation per tax jurisdiction

Tax Jurisdiction	Constituent Entities Resident in the Tax Jurisdiction	Tax Jurisdiction of Organization or Incorporation if Different from Tax Jurisdiction of Residence	Main Business activities										
			Research & Development	Holding or Managing Intangible Property	Purchasing or Procurement	Manufacturing or Production	Sales, Marketing and Distribution	Administrative, Management and Support services	Provision of Services to Unrelated parties	Internal Group Finance	Dormant	Others	

India regulations provide for these details and any other details that may be prescribed

Table 3. Additional information

Name of the MNE Group: Fiscal Year concerned												
Please include any further brief information or explanation you consider necessary or that would facilitate the understanding of the compulsory information provided in the Country-by-Country Report.												

Interplay of TP and GST

5



Value of Supply under GST Act

Supply between related persons

Section 15(1)

The value of a supply of goods or services or both shall be the transaction value, which is the **price actually paid or payable** for the said supply of goods or services or both where the **supplier and the recipient of the supply are not related** and the **price is the sole consideration** for the supply.

Section 15(4)

Where the value of the supply of goods or services or both cannot be determined under sub-section (1), the same shall be determined in such manner as may be prescribed.

Value of Supply under GST Act

Supply between related persons

First explanation to Section 15

For the purpose of this Act, Persons shall be deemed to be “Related Persons” if:

- i. They are officers or directors of one another's businesses;
- ii. They are legally recognized partners in business;
- iii. They are employer and employee;
- iv. Any person directly or indirectly owns, controls or holds 25% or more of the outstanding voting stock or shares of both of them;
- v. One of them directly or indirectly controls the other;
- vi. Both of them are directly or indirectly controlled by a third person;
- vii. Together they directly or indirectly control a third person; or
- viii. They are members of the same family.

Key Provisions under GST Act

Concept of Supply

- Under GST, any supply of goods or services with or without consideration between related / distinct persons is subject to GST
- Value of supplies made to related / distinct persons will be determined in the following sequential order:
 - Open Market Value (OMV) of such supply.
 - Value of like kind and quality of supply of goods / services or both
 - 110% of the cost of provision of services
 - Reasonable means consistent with the principle and general provisions of Section 15 of the CGST Act and the Rules
- In case where the recipient is eligible for full input tax credit, the value declared in the invoice would be deemed to be OMV

Relevant FAQs

Free of cost services

- As a general principle, import of services without consideration will not be considered as supply under GST in terms of Section 7
- However, import of services by a taxable person from a related person or from any of his other establishments outside India, in the course or furtherance of business, even without consideration will be treated as supply in terms of Sl. No.4 of Schedule I.

Value of Supply under GST Act

Overview of Valuation Rules

Rule 28: Supplies made to related persons/ distinct persons

- The value of supply would be Open Market Value (‘OMV’)
- If the OMV is not available. the value of supply would be value of goods or services of Like Kind or Quality
- In case the value of supply is not determinable basis either of the above, reliance would have to be placed on Rule 30 or Rule 31 (in that order)
- Provided that where goods are intended for further supply by the recipient, the value shall, at the option of the supplier, be an amount equivalent to ninety percent of the price charged for the supply of goods of like kind and quality by the recipient to his customer not being a related person

Rule 28: Supplies made to related persons/ distinct persons

- For example – A sells goods to related person B. B further sells goods of like kind and quality to C; an unrelated person for INR 1000. In such situations, A has the option to value the supply of goods to B at INR 900 (i.e. 90% of price charged by recipient [B] to his customer [C], not being a related person)
- Provided further that where the recipient is eligible for full input tax credit, the value declared in the invoice would be deemed to be open market value of such supply

Value of Supply under GST Act

Overview of Valuation Rules

Rule 30: Valuation on basis of cost

- If the value of supply cannot be determined by any of the previous rules, the value shall be 110% of the cost of production or manufacture or cost of acquisition of such goods or cost of provision of such services

Rule 31: Valuation on basis of reasonable method

- Where the value of supply cannot be determined under any previous rules, the same shall be determined using reasonable means consistent with the principles and general provisions of Section 15 of GST Act and the Valuation Rules
- Further, a supplier of services may opt for this rule, disregarding the rule for valuing supply on basis of cost (i.e. Rule 4)

Questions



Thank You