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# Global Tax Alert

**News from Transfer Pricing**

# India's Tax Administration amends rules relating to interest income computation for secondary transfer pricing adjustments

## Executive summary

*India's Finance Act, 2017* introduced the secondary transfer pricing (TP) adjustment provisions in the Indian Tax Law (ITL) to ensure that the actual allocation of funds between Associated Enterprises (AEs) is consistent with the primary TP adjustment. Under the secondary adjustment provisions, if the primary adjustment is not repatriated to India within the prescribed time, such amount would be deemed to be an advance made by the taxpayer to such AE and interest would be charged on the advance in the manner prescribed. The Central Board of Direct Taxes, the apex Indian Tax Administration, vide a notification dated 15 June 2017, issued rules for implementation of the provision by prescribing the time limit for repatriation and the method for computing the interest. However, to address certain ambiguities in applying these provisions, the Indian Tax Administration on 19 June 2018 issued Draft Rules, inviting public comments.

Pursuant to the above-mentioned draft rules and post public consultation, the Indian Tax Administration has now amended the said Rule through a notification dated 30 September 2019.



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## Detailed discussion

A primary adjustment is defined to mean the determination of a transfer price in accordance with the arm's-length principle resulting in an increase in the total income or reduction in the loss of a taxpayer. A secondary TP adjustment has been defined to mean an adjustment in the books of accounts of the taxpayer and its AE to reflect the actual allocation of profits between the two is consistent with the transfer price determined under the primary adjustment.

As per the ITL, the secondary TP adjustment will be applicable where a primary TP adjustment to the transfer price: (a) has been made voluntarily by the taxpayer in the tax return; (b) made by the tax officer and has been accepted by the taxpayer; (c) is determined under an Advance Pricing Agreement (APA) entered into by the taxpayer; (d) is made as per the safe harbor rules; or (e) is arising as a result of a Mutual Agreement Procedure (MAP) resolution under a Double Taxation Avoidance Agreement.

The primary adjustment, if not repatriated to India within the prescribed time, shall be deemed to be an advance made by the taxpayer to such AE and interest on such advance shall be computed in the hands of the taxpayer in such manner as prescribed.

The Indian Tax Administration, through its notification dated 15 June 2017, issued rules prescribing the time limit for repatriation of a primary adjustment as well as the applicable rate for interest computation in cases where the primary adjustment is not repatriated to India. However, while implementing these provisions, certain difficulties were noted in respect of the primary adjustment that arises under an APA entered into by the taxpayer or on account of an agreement reached under MAP.

To address these difficulties, on 19 June 2018, the Indian Tax Administration issued Draft Rules pertaining to the application of "secondary adjustment" provisions in the case of an APA or MAP requesting public comments.

Pursuant to the above, the Indian Tax Administration, through its notification dated 30 September 2019, has now amended the said Rule[1] not only in relation to the above-mentioned aspects which were covered in the Draft Rules, but also clarifying certain other aspects in relation to the computation of interest as detailed below.

### In relation to the time limits for repatriation where the primary TP adjustment has been determined by an APA/MAP

| Primary adjustment determined by | Old rule | Change proposed as per Draft Rules for public comments | New rule |
|---|---|---|---|
| APA | On or before 90 days from the due date for filing the tax return | On or before 90 days from the date on which the APA has been entered into by the taxpayer | a) If the APA has been entered into on or before the due date for filing tax return for the relevant fiscal year –<br>On or before 90 days from the date for filing the tax return<br>b) If the APA has been entered into after the due date of filing the tax return for the relevant fiscal year –<br>On or before 90 days from the end of the month in which APA has been entered into |
| MAP | On or before 90 days from the due date for filing the tax return | On or before 90 days from the date of giving effect by the tax officer to the resolution reached under the MAP | On or before 90 days from the date on which the tax officer gives effect to the MAP resolution |

### Other amendments

- The reference to "excess money" available with the AE in the said Rule has been amended to "excess money or part thereof" thereby aligning the Rule to the recently amended Secondary Adjustment provision as per the ITL,[2] providing the option of partial repatriation of such excess money.

### Timeline from when the interest on excess money or part thereof shall be chargeable

The Indian Tax Administration has also clarified the timelines from when the interest on the excess money or part thereof shall be chargeable. The same is provided below:

| Primary adjustment arising on account of | Timeline from when interest shall be chargeable |
|---|---|
| i. Voluntary adjustment in the tax return<br>ii. An APA entered into on or before the due date for filing the tax return for the relevant fiscal year<br>iii. Safe harbor rules | From the due date for filing the tax return for the relevant fiscal year |
| Order of tax officer or Appellate Authority | From the date of the order of the tax officer or the appellate authority, as the case may be |
| APA entered into after the due date for filing the tax return | From the end of the month in which the APA has been entered into by the taxpayer |
| MAP | From the date on which the tax officer gives effect to the MAP resolution |

### Exchange rate

In the respective notification, the Indian Tax Administration has also clarified that the exchange rate in relation to an international transaction denominated in foreign currency shall be the Telegraphic Transfer (TT) buying rate of such currency on the last day of the previous year in which such international transaction was undertaken.

## Implications

The former rule for computation of interest income for secondary adjustments had certain ambiguities in relation to the timelines prescribed in cases where the primary TP adjustment is determined pursuant to MAP or an APA, which are typically concluded well after the due date for filing tax returns, thereby resulting in the expiration of the deadline before the acceptance of the primary adjustment by the taxpayer. The amended Rule is a welcome change as it not only addresses the ambiguities present in the former rule, but also provides clarity on aspects not covered under the former rule.

### Endnotes

1. Rule 10CB of the Income Tax Rules, 1962.
2. Through *Finance (No. 2) Act 2019*.

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