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Newsflash: CBDT extends applicability of Safe Harbour rules to Assessment Year 2021-22

[Notification No. 117/2021/F. No. 370142/44/2021-TPL]

1.0 Background

In order to reduce the increasing number of transfer pricing litigations and prolonged disputes, the Finance (No. 2) Act, 2009 with retrospective effect from 1.4.2009 inserted a new section 92CB of the Income-Tax Act ('the Act'), to provide that determination of arm's length price under section 92C or Section 92CA of the Act shall be subject to Safe Harbour rules ('SHR'). Vide this amendment, the Government of India had empowered the Central Board of Direct Taxes ('CBDT') to make SHR. Safe Harbour Rules refers to the circumstances in which the tax authorities shall accept the prescribed transfer price declared by the taxpayer to be at arm's length.

On 18 September 2013, CBDT through a notification issued SHR - Rules 10TA to 10TG of Income Tax Rules ('the Rules') and Form 3CEFA (for international transactions) and Rules 10TH to 10THD and Form 3CEFB (for domestic transactions). Safe Harbour Rule applies to a defined category of taxpayers or transactions and that relieves eligible taxpayers from certain obligations otherwise imposed by transfer pricing rules. The rules are optional and provide the transfer price/ minimum operating margin a tax payer may declare for certain categories of transactions. SHR provides certainty that the taxpayer's transfer prices will be accepted by the tax administration, provided they have met the eligibility conditions of, and complied with, the Safer Harbour provisions.

CBDT on 7 June 2017 through a notification issued SHR with revised margins in the range of 17-24%. These SHR were applicable from AY 2017-18 to AY 2019-20. The transactions covered under Safe Harbour Rules include specified international transactions and which are mentioned below:

- provision of software development services;
- provision of information technology enabled services;
- provision of knowledge process outsourcing services;
- advance of intra-group loan;
- provision of corporate guarantee;
- provision of contract research and development services wholly or partly relating to software development and generic pharmaceutical drugs;
- manufacture and export of core and non- core auto components; and
- receipt of low value-adding intra-group services from one or more members of its group

Subsequently, CBDT extended the applicability of existing SHR for the AY 2020-21 on 20 May 2020, without any modifications.

On 24 September 2021, to provide benefit of SHR to taxpayers CBDT has further extended the SHR for AY 2021-22 and prescribed margins are as per the existing SHR. Below are the summary of notifications issued by CBDT in relation to SHR rules:

Date	Notification No.	Period Covered
18 September 2013	No.73/2013[F.No.142/28/2013 -TPL]	AY 2013-14 to AY 2017-18
7 June 2017	No. 46/2017/F.No.370142/6/2017-TP	AY 2017-18 to AY 2019-20
20 May 2020	No. 25/2020/F.No.370142/14/2020-TPL]	AY 2020-21
24 September 2021	No. 117/2021/F.No.370142/44/2021-TPL	AY 2021-22

Below are the summary of rates prescribed under Rule 10TD for ready reference:

Sr. No.	Eligible International Transactions	Safe Harbour rates – applicable for AY 2021-22
1	Provision of Software development services (IT) and Information Technology Enabled Services (ITES)	Operating profit margin to operating expense <ul style="list-style-type: none"> • Where the aggregate value of such transactions ≤ INR100 crore – not less than 17% • Where the aggregate value of such transactions > INR 100 crore ≤ INR 200 crore – not less than 18%

Sr. No.	Eligible International Transactions	Safe Harbour rates – applicable for AY 2021-22
2	Provision of Knowledge Process Outsourcing Services (KPO)	<p>The value of international transaction \leq INR 200 crore and the operating profit margin to operating expense is –</p> <ul style="list-style-type: none"> • Not less than 24%, if the Employee Cost to Operating Expense is at least 60% • Not less than 21%, if the Employee Cost to Operating Expense is 40% or more but less than 60%; or • Not less than 18%, if the Employee Cost to Operating Expense does not exceed 40%
3	Advancing of intra-group loans where the amount of loan is denominated in Indian Rupees (INR)	<p>The interest rate declared in relation to the eligible international transaction is not less than the one-year marginal cost of funds lending rate of State Bank of India as on 1st April of the relevant previous year plus basis points as below:</p> <ul style="list-style-type: none"> • 175 basis points, where the AE has CRISIL credit rating between AAA to A or its equivalent • 325 basis points, where the AE has CRISIL credit rating of BBB-, BBB or BBB+ or its equivalent • 475 basis points, where the AE has CRISIL credit rating between BB to B or its equivalent • 625 basis points, where the AE has CRISIL credit rating between C to D or its equivalent • 425 basis points, where credit rating of the AE is not available and aggregate amount of loan advanced to all AEs as on 31st March of the relevant previous year $<$ INR 100 crore
4	Advancing of intra-group loans referred to in item (iv) of rule 10TC where the amount of loan is denominated in foreign currency .	<p>The interest rate declared in relation to the eligible international transaction is not less than the six-month London Inter-Bank Offer Rate of the relevant foreign currency as on 30th September of the relevant previous year plus basis points as below:</p> <ul style="list-style-type: none"> • 150 basis points, where the AE has CRISIL credit rating between AAA to A or its equivalent • 300 basis points, where the AE has CRISIL credit rating of BBB-, BBB or BBB+ or its equivalent • 450 basis points, where the AE has CRISIL credit rating between BB to B or its equivalent • 600 basis points, where the AE has CRISIL credit rating between C to D or its equivalent • 400 basis points, where credit rating of the AE is not available and aggregate amount of loan advanced to all associated enterprises as on 31st March of the relevant previous year $<$ INR 100 crore
5	Provision of corporate guarantee	Commission or fee is not less than 1% per annum on the amount guaranteed
6	Provision of specified contract research and development services wholly or partly relating to software development	The operating profit margin to operating expense not less than 24% , where the value of the international transaction is \leq INR 200 crore
7	Provision of contract research and development services wholly or partly relating to generic pharmaceutical drugs	The operating profit margin to operating expense not less than 24% , where the value of the international transaction is \leq INR 200 crore
8	Manufacture and export of: ➤ core auto components	Operating profit margin to operating expense: • Not less than 12%

Sr. No.	Eligible International Transactions	Safe Harbour rates – applicable for AY 2021-22
	➤ non-core auto components	<ul style="list-style-type: none"> • Not less than 8.5%
9	Receipt of low value-adding intra-group services	Aggregate value of such transactions does not exceed INR 10 crore (including markup not exceeding 5%). Provided that the method of cost pooling, the exclusion of shareholder costs and duplicate costs from the cost pool and the reasonableness of the allocation keys used for allocation of costs to the taxpayer by the overseas AE, is certified by an accountant.

2.0 Our Comments

In order to provide relief to taxpayers, government has extended the SHR with retrospective effect for AY 2021-22. However, the government has not considered the impact of pandemic / lockdown in India and underlying economic factors which has negatively impacted several businesses in AY 2021-22.

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