

Convergence and sustainability in the digital era

Recent experience with Advance Pricing Agreement (APA)



**ICAI**  
**INTERNATIONAL  
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Accountancy Profession: Convergence and Sustainability in Digital Era

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# Convergence and sustainability in the digital era

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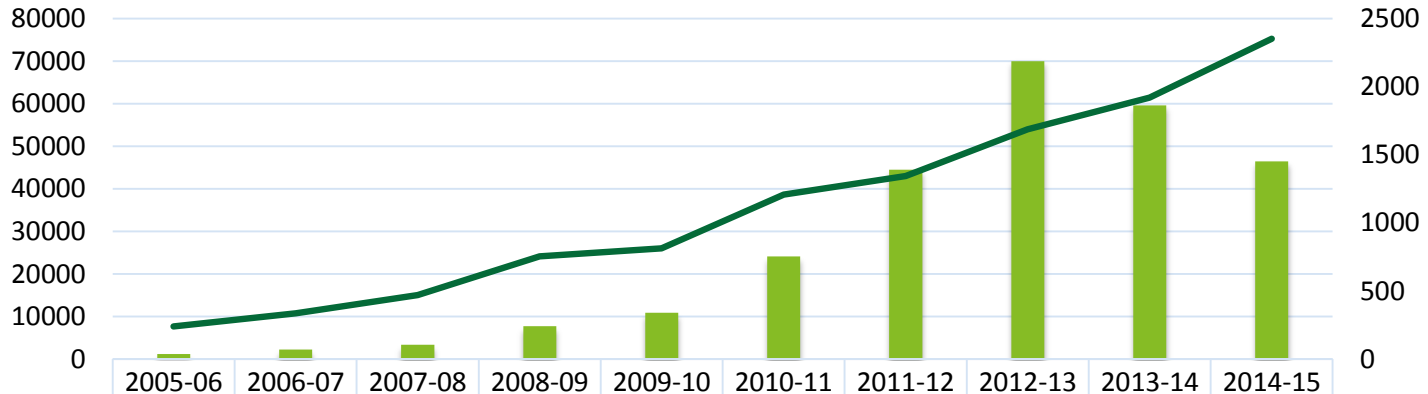
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# Transfer pricing litigation trends in India

# Transfer pricing disputes-Indian scenario



■ Est. adj. (INR in million)*	1220	2287	3432	7754	10908	24111	44532	70016	59602	46466
— No. of adj. cases	239	337	471	754	813	1,207	1,343	1,686	1,920	2353

■ Est. adj....

— No. of adj....

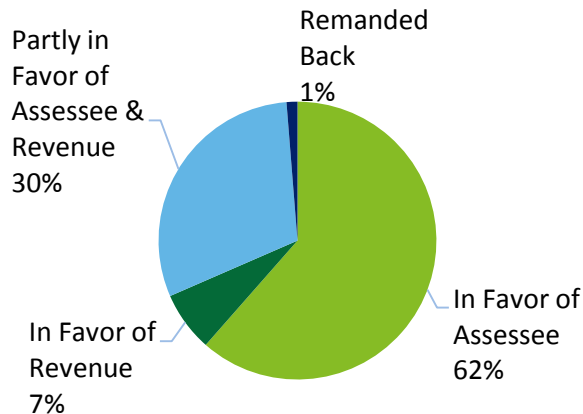
The quantum of TP additions made by tax authorities is very high. However, the additions do not add to the revenue base of the government as most of them are either locked up in disputes at various levels or get deleted by the appellate authorities.



## Statistics of transfer pricing assessment\*

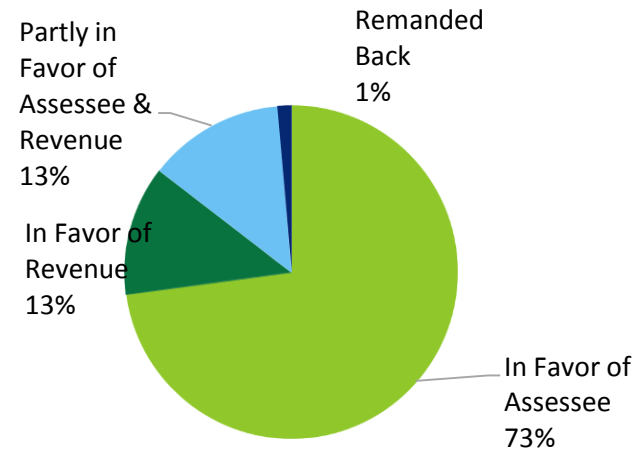
### Matters disposed (> 3700) by benches of ITAT

- 62% cases have been decided in favor of assessee, 30% in favor of both i.e. the Revenue and assessee, 7% in favor of the Revenue and only 1% have been remanded back.



### Matters disposed (>450) by High Courts

- Close to 73% of the decisions by High Courts are in favor of the assessee, 13% in favor of the Revenue, 13% partly in favor of Revenue as well the assessee and 1% have been remanded back



\* As per market intelligence, some approximation



## MAP resolutions – global and Indian scenario



- ✓ The OECD released its MAP statistics on Nov 27, 2017 highlighting the following interesting facts :
  - Close to 8000 cases were in the inventory of the reporting jurisdictions as of 1 January 2016 and almost 25% of them were closed during 2016
  - 1,500 cases started on or after 1 January 2016, and approx. 25% of them were also closed in 2016.
- ✓ India is second highest to the US with 569 cases pending in MAP. However, India has been swiftly resolving MAP cases for last two years and has resolved more than 250 MAP cases till date covering both TP and non TP cases such as the US, UK, China and Japan and negotiation meetings are going on with many other countries such as Australia, Singapore, Canada and Netherlands.

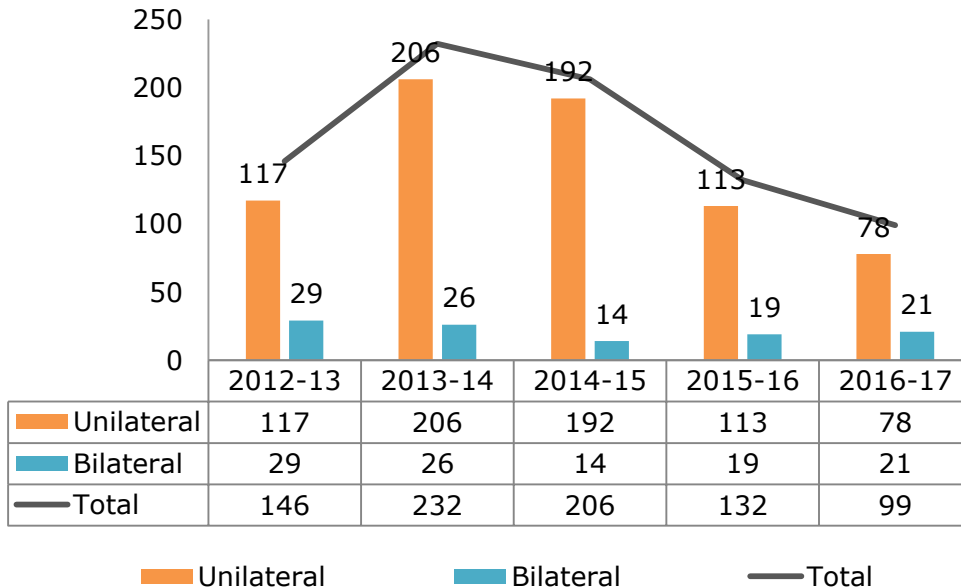


# Indian APA Scheme - Update

# India APA filings - story so far



## Total applications filed in India exceeds 800 in five filing cycles



## Reason for dip in APA filings since FY 2015-16

- Majority of companies with adjustments have already filed applications
- Companies with smaller scale of operations considered safe harbour route (SHR) as a feasible option since their litigation costs outweighed the premium paid for certainty provided by the SHRs.

01 Significant volume of applications have been filed year on year

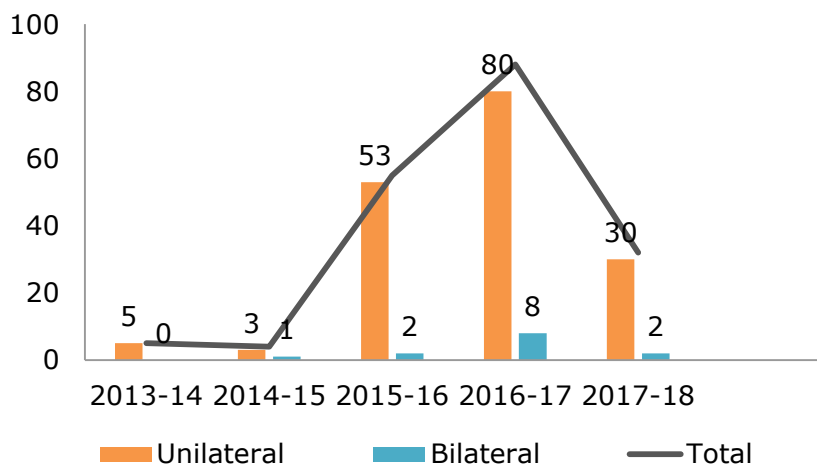
02 Larger no. of unilateral APAs have been filed as compared to bilateral APAs. Several reasons for lower bilateral APA can be faster resolution of unilateral APA, multiple jurisdictions of associated enterprise, Indian entity not very significant in the global operations or double filing fee and high cost of resources involved .



# India APA conclusions – story so far



## Total conclusions 184 - 171 unilateral and 13 bilateral APA concluded so far



## APA conclusion trend

- Signing of FIRST batch of unilateral APA-March 2014 and FIRST bilateral APA-December 2014 .
- Gained momentum in the third year with 55 and 88 APAs being concluded in FY 2015-16 and FY 2016-17 respectively , indicating the pragmatic and proactive approach of the APA teams.
- 17\* bilateral applications have been filed with Japanese headquartered (HQ) companies, of these 5^ being sogo shosha have been concluded.
- 39\* bilateral applications have been filed with UK HQ companies , of these 8” have been concluded.

- 01 APA team strengthened since new APA commissioners have been appointed for Mumbai and Bangalore, thereby ensuring faster settlement of the APA inventory, however , after reaching a peak, the APA disposals have come down due to new officers taking charge.
- 02 Joint site visits are being conducted with other countries for expediting the conclusions of the ongoing bilateral cases
- 03 Post compliance feedback is being taken by the authorities to address the grievances faced by the taxpayers
- 04 Recently India has adopted a flexible approach much ahead of MLI and has agreed for MAP & BAPA negotiations irrespective of existence of article 9(2) in the treaty of the other country.
- 05 Every month at least one country is adding the APA scheme in its legislation e.g. Ireland and Panama have recently introduced the same.

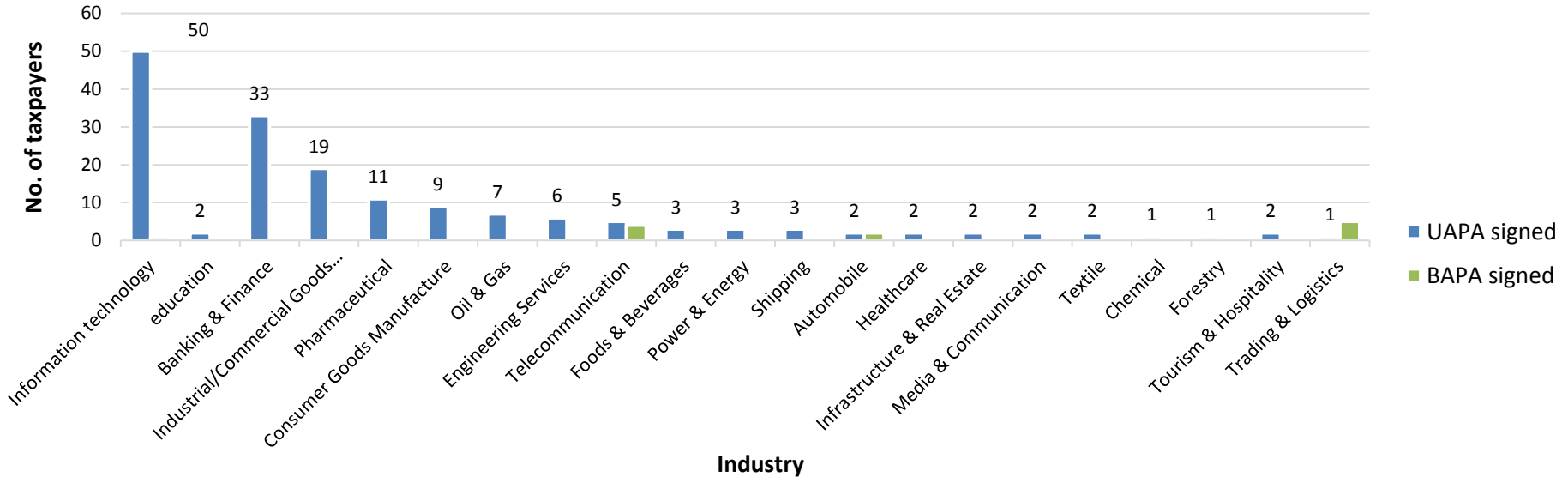
\*CBDT's APA performance report published in April 2017

^CBDT press release dated March 07,2017, "CBDT's press release dated September 04,2017

# India APA conclusions – story so far



## INDUSTRY-WISE CONCLUSIONS



## SECTOR WISE APA CONCLUSIONS

Particulars	Service	Manufacturing	Trading	Diversified
UAPA	125	41	1	4
BAPA	6	2	5	0

- There are 21 different types of industries that have availed the Indian APA programme.
- Close to 50% of the total unilateral APAs entered into are with information technology and banking/finance industries since they face the maximum litigation



**Global trend**

# Global trend<sup>1</sup>



Country	India			Korea			China*			Japan	US				Canada	Australia**
APA age (years)	2012-13 (5 yrs.)			FY 2007-08 (9 yrs.)			FY 2004-05 (12 yrs.)			FY 1987-88 (29 yrs.)	FY 1990-91 (26 yrs.)				FY1990-91 (26 yrs.)	FY 2010-11 (6 yrs.)
Data date	Mar 2017			Dec 2015			Dec 2016			Jun 2016	Dec 2016				Dec 2016 <sup>4</sup>	Jun 2016
U/B/M and Total	Total	U	B	Total	U	B	Total	U	B	B	Total	U	B	M	Total	Total
Total APAs filed	814	705	109	498	178	320	277	85	192	1820	2245	556 <sup>1</sup>	1278 <sup>1</sup>	10 <sup>1</sup>	359 <sup>1</sup>	776
Filings last FY	100 <sup>†</sup>	80 <sup>†</sup>	20 <sup>†</sup>	43	8	35	NA	NA	NA	151	98	14	84	0	12	131
Total APAs signed	184	171	13	340	160	180	139	84	55	1466*	1597	560	1023	14	286	197
Signing last FY	88	80	8	42	13	29	14	8	6	126	86	21	65	0	26	41
Countries with max BAPA	-	-	UK	-	-	Jap, US	-	-	Asia	OECD 14 Non-OECD 8	NA	NA	Jap	NA	US	NA
Average time taken (yrs)		1.5●	2.5●	-	1.9	2.5	-	1	2	2.1	NA	2.9	4.2	NA	4	U:1 B:2

<sup>1</sup>Based on the latest annual reports of the countries

\*introduced in late 90s on trial basis. Formal APA from 2004

\*\*introduced in 90s but the data available from FY 2010 – 11

<sup>†</sup>This figure excludes 401 applications which were filed during 1991-1999 since the bifurcation between unilateral and bilateral is not available

<sup>1</sup>These are indicative numbers as per our market intelligence

●These are aspirational timelines which the Indian Competent Authorities intend to achieve in the foreseeable future. Currently, due to Initial years of the program, the average time is higher.

<sup>4</sup>Tentative numbers as per CRA report , <sup>1</sup>Data date Aug 2015



## India vis-à-vis major economies

- ✓ The frontrunners in the implementation in the APA schemes, almost two decades ago, included countries such as US, Canada and Japan. India can benefit from the global APA knowledge bank built over two decades by these countries.
- ✓ Unlike India in most of the countries around the world, bilateral APAs are encouraged by their governments. Thus, bilateral filings are higher than the unilateral filings as can be evidenced from the statistics of Korea, China, Japan and US.
- ✓ None of the country other than US has entered into multilateral APA applications being 10.
- ✓ Due to high litigation, Indian APA filings have surpassed total APA filings in Korea, China, Australia, Canada where the APA scheme has existed for a no. of numbers.
- ✓ India has reached at par with US in per year conclusions of APAs. Further, both US and Japan have the APA scheme for more than 25 years and have almost similar volumes of APA filings & conclusions.
- ✓ Though Canada also has the APA scheme for more than 25 years but due to possibly low litigation environment in the country, the total number of applications is only 359 out of which 286 have already been concluded.
- ✓ Japan & China are the fastest in concluding the APAs as their average time taken to conclude the APAs is lowest amongst other countries.
- ✓ India & Australia both introduced the scheme almost at the same time & the progress is similar since 814 applications have been filed in India vis-à-vis 776 applications in Australia. Out of these, 184 APAs have been concluded in India vis-à-vis 197 in Australia.



**Recent APAs- Key learnings and points to be reviewed**



### Focus of the APA authorities in respect of the particular covered transactions

- In case of IT/ITeS - emphasis is placed by the authorities on the FAR profile and PE aspect.
- In case of IGS – the authorities focus on the need benefit test, demarcation between management services and shareholder services, detailed documentation and generally the resolution is based on turnover and other similar criteria.
- Royalty –Most of the APAs till date have been concluded for brand royalty only and very few have been concluded for technical royalty. Further, royalty payment is allowed subject to availability of profitability with the entity.



### Pragmatic APA authorities

- Authorities are not influenced by the preceding TP litigation of the applicant.
- APA authorities are open to accept ideas and they are flexible towards giving working capital, risk adjustment , capacity adjustments as well as comparability adjustments.
- Also a high degree of emphasis is placed on the maintenance of documentation.
- Considering the detailed analysis in APA proceedings, appellate authorities have agreed to apply the pricing agreed in APAs to even prior years not covered in the rollback years.



## Pendency, post APA challenges and cherry picking

- ✓ **Pendency** : Intricate information requirements may be raised by the APA authorities. At times the APA authorities follow the footsteps of a TPO while raising queries and due to this, the client takes months to collate the info, thereby delaying the proceedings.
- ✓ **Post APA challenges** : It has been observed that some of the terms & conditions in the APA may be loosely worded, thereby having posing a post conclusion repercussion. Thus, the authorities as well as the taxpayer should be more vigilant to ward off the post APA practical challenges.
- ✓ **Cherry-picking of cases** -Inspite of 5 years there is a large pendency of cases. The authorities are under pressure to close the cases and are thus taking up less complex cases to achieve the annual targeted APA cases.





**CBDT relaxes article 9(2)  
condition**



## Revision in the extant position on article 9(2)

- ✓ Central Board of Direct Taxes (CBDT) has issued a press release on Nov 27, 2017, revising therein its extant position.
- ✓ CBDT would accept applications for bilateral Advance Pricing Agreement (APA) and Mutual Agreement Procedure (MAP) for transfer pricing cases even for associated enterprises (AEs) which are resident of countries with whom the treaties do not include Article 9(2).
- ✓ Open issues to be considered :
  - For this position to be effective, the other country needs to follow similar approach i.e. whether Germany, France, etc. would accept MAP and bilateral APA applications with India?
  - If so, what would be the covered period; apart from being prospective, can some past years in rollback be covered? What will be the roll back period?