

TRANSFER PRICING

- Existing provisions in relation to the arm's length price range state that at the option of the taxpayer, the arm's length price may be determined as a price which may vary from the arithmetical mean by an amount not exceeding five per cent of such arithmetical mean. This provision has been subject to conflicting interpretation by the assessee and the Income Tax Department. The assessee's view is that the arithmetical mean should be adjusted by 5 per cent to arrive at the arm's length price. However, the department's contention is that if the variation between the transfer price and the arithmetical mean is more than 5 per cent of the arithmetical mean, no allowance in the arithmetical mean is required to be made.

With a view to resolving this controversy, it is proposed to amend the proviso to Section 92C to provide if the arithmetical mean, so determined, is within five per cent of the transfer price, then the transfer price shall be treated as the arm's length price and no adjustment is required to be made. This amendment will take effect from 1st October, 2009 and shall accordingly apply in relation to all cases in which proceedings are pending before the Transfer Pricing Officer (TPO) on or after such date.

- A new Section inserted to enable CBDT to make Rules with respect to safe harbour provisions. These rules would provide the circumstances in which the income tax authorities shall accept the transfer price declared by the assessee as an arm's length transfer price.

Dispute Resolution Panel

- In order to improve tax administration and avoid prolonged uncertainty in tax related matters for foreign companies or transfer pricing matters, it is proposed to introduce an alternate dispute resolution mechanism which will facilitate expeditious resolution of disputes in a fast track basis with effect from 01.10.2009.

Prior to finalization of an adverse order, the assessing officer shall need to forward a draft of the proposed order of assessment (draft order) to the above mentioned assessee, who may file his objections to the draft order with the DRP. The DRP shall after due consideration issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the

assessment. The law provides for the process, powers and time frames for the dispute resolution, besides enabling the CBDT to prescribe further rules for its efficient functioning.

Key aspects to note are:

- The DRP has to provide a conclusive view i.e. it may confirm, reduce or enhance the variations proposed in the draft order. The DRP is not authorized to merely set aside any proposed variation or issue any direction for further enquiry and passing of the assessment order by the AO. Every direction issued by the DRP shall be binding on the Assessing Officer and the same is appealable only with the Appellate Tribunal.
- No direction shall be issued unless an opportunity of being heard is given to the assessee and the AO on such directions which are prejudicial to the interest of the assessee or the revenue, respectively. The DRP proceeding to be completed within 9 months from the end of the month in which the draft order is forwarded to the eligible assessee.
- The DRP shall have the same powers as are vested in a Court under the Code of Civil Procedure, 1908 (5 of 1908);