INDIA

SAFE HARBOUR PROVISIONS INTRODUCED

The Indian Revenue has introduced transfer pricing safe harbour provisions in India. It had been noted that the amount of transfer pricing adjustments made by the Revenue was quite high, resulting in uncertainty for taxpayers in relation to transfer pricing and their tax position. The single largest controversy concerned the mark-up for captive software development and back office services.

The resulting litigation led to numerous rulings being made by the tax tribunals in the last 2-3 years. These rulings were mostly in favour of the taxpayer, but various tax tribunal benches took contradictory positions on some tax issues.

The following table lists the safe harbour rates for various services:

Applicability

The rule is applicable for five years starting from assessment year 2013-14 (financial year ending March 2013).

Does the taxpayer have an option?

Every taxpayer can opt for the safe harbour provisions, subject to eligibility as described in the table below with regard to the value of the turnover/transaction and the nature of the services being rendered.

Taxpayers who are eligible to opt for the safe harbour provisions can also decide not to opt for these. In such cases the taxpayers will be subject to a normal transfer pricing audit and documentation requirements, and the arm's length price will not be influenced by the rates prescribed in the table below.

Will the provisions automatically apply under the audit process?

There is no automatic process even for taxpayers who are eligible to opt for the safe harbour provisions - the taxpayer has to apply to the Revenue, using a specific form. The Revenue would then allow the taxpayer to use the provisions, after due verification of the records and eligibility criteria.

Does the tax payer have to maintain documentation?

Yes, the taxpayer has to maintain the documentation required by the legislation, irrespective of whether or not he is opting for the safe harbour provisions. However, the taxpayer does not have to undertake a comparability analysis once he is categorised as eligible for safe harbour purposes.

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Transaction	Ceiling (INR)	Safe Harbour Margin
Software development (other than Contract R&D)	Up to 5,000 million	20% margin on operating cost
	More than 5,000 million	22% margin on operating cost
Information Technology Enabled Service	Up to 5,000 million	20% margin on operating cost
(other than Contract R&D)	More than 5,000 million	22% margin on operating cost
Knowledge Processes Outsourcing (other than Contract R&D)		25% margin on operating cost
Loan to wholly owned foreign subsidiaries	Less than 500 million	State Bank of India Base Rate plus 150 basis points
(sourced in Indian Rupees)	More than 500 million	State Bank of India Base Rate plus 300 basis points
Corporate guarantee on behalf of wholly owned subsidiaries	Above 1,000 million	Commission @ 1.75%
Contract R&D relating to software development	No Ceiling	30% margin on operating cost
Contract R&D relating to generic pharmaceutical drugs	No Ceiling	29% margin on operating cost
Manufacture and Export of core auto components	No Ceiling	12% margin on operating cost for core auto components
	No Ceiling	8.5% margin on operating cost for non-core auto components