



Discussion Paper

Advance Pricing Agreements

Income Tax



South African Revenue Service

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CONTENTS

1.	Introduction	1
2.	Dispute resolution and tax certainty	1
3.	Considerations in implementing an advance pricing agreement system	2
4.	Recommendations by the Davis Tax Committee	3
5.	International benchmarking	4
6.	The way forward.....	5
7.	Legislative framework.....	6
8.	Conclusion	10
	Annexure A – International benchmarking: Advance pricing agreements	12
	Annexure B – List of references.....	22

1. Introduction

Multi-national enterprises (MNEs) play important roles around the world and even more so when they invest in developing countries (like South Africa), which need foreign direct investment as a means to grow their economies and lift the majority of their populations out of poverty.

MNEs are generally driven by a profit motive, which may result in them engaging in harmful practices that erode the tax bases of developing countries through transactions that are not at arm's length and complex and time consuming to audit. According to the OECD's 2017 *Transfer Pricing Guidelines for MNEs and Tax Administrations* –

“[t]ransfer prices are the prices at which an enterprise transfers physical goods and intangible property or provides services to associated enterprises.”

By way of a simple example, an MNE with a subsidiary in a developing country with a high corporate income tax rate and another subsidiary in another country with a low corporate income tax rate will seek to move revenue, through inflated management or other service-related fees, from the subsidiary in the developing country (tax deduction that reduces taxable income at high tax rate) to the subsidiary in the other country (income taxed at low tax rate). In another example relating to the same group structure, the subsidiary in the developed country will sell machinery and equipment at inflated prices (sales income taxed at low tax rate) to the subsidiary in the developing country (excessive depreciation or wear and tear tax deductions reduce taxable income at high tax rate) and the subsidiary in the other country will sell raw materials and mineral extracts at low prices (low taxable sales income at high tax rate) to the subsidiary in the developed country to on-sell to the rest of the world at market-related prices (high taxable sales income at low tax rate).

In line with these examples, base erosion and profit shifting (BEPS) has been topical around the world in recent years. Countries have become very concerned about MNEs aggressively shifting their profits from high-tax countries (often developing countries) to low-tax countries (often tax havens) in an attempt to reduce their corporate taxes. The G20 committed itself from as early as 2012 to curtail this behaviour. The OECD followed this up by publishing its 15-point BEPS Action Plan in 2013.

In order to contextualise the BEPS Action Plan for purposes of this paper, Actions 8, 9, 10 and 13 of the Plan deal with transfer pricing whilst Action 14 deals with dispute resolution mechanisms such as mutual agreement procedures and advance pricing agreements.

South Africa is a member of the G20, the OECD/G20's BEPS Project and the OECD's Inclusive Framework, in addition to its OECD Committee on Fiscal Affairs observer status since 2004. It is, therefore, by association, obliged to implement the recommendations in the OECD/G20's BEPS Action Plan where these are agreed minimum standards but need not do so where the recommendations are best practices and are not in its best interests.

2. Dispute resolution and tax certainty

A key part of implementing the BEPS Action Plan is ensuring that, just as an MNE should not escape taxation in any country, an MNE is not unfairly taxed in two countries simultaneously. This would be the case where countries do not adhere to the agreed outcomes of the BEPS Project or where one of the countries makes an upward transfer pricing adjustment to an MNE's

taxable income and the other country does not make a corresponding downward adjustment. Dispute resolution mechanisms are, therefore, vital for global tax harmony.

The OECD Model Tax Convention on Income and Capital and the United Nations equivalent (the model conventions) help to address double taxation and double non-taxation by providing a template for countries to enter into double taxation agreements (DTAs). Article 25 of the model conventions allows for countries to include a mutual agreement procedure (MAP) in a DTA (tax treaty) where disputes arise with regard to upward and downward adjustments to the taxable income of the same taxpayer (or separate members of an MNE) that has a taxable presence in both jurisdictions.

Although South Africa has a wide network of DTAs, it has only three DTAs that include binding arbitration clauses should a MAP reach a stalemate. Arbitration is provided for in Article 25 of the OECD Model and is an option, in a different form, in the UN Model commentary. Article 25 also allows for countries to give effect to advance pricing agreement (APA) programmes on a bilateral basis. According to the OECD, an APA is an –

“arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g. method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time”.

Advance pricing agreements, therefore, help to avoid disputes, reduce MAPs, and create an environment of tax certainty that investors look for before they invest.

3. Considerations in implementing an advance pricing agreement system

For South Africa to determine the approach it will take with regard to implementing an APA system, it has to consider its policy for economic growth, its main trading partners, its DTA partners and its taxation priorities, capacity and strategic objectives. The need to maintain its status as a leader on the African continent and its position as a gateway for foreign investment into the rest of Africa should also be taken into account. Gateway-to-Africa incentives can be enhanced by an APA programme.

To promote tax certainty in South Africa, an advance tax ruling (ATR) system was implemented in 2006. However, an application for an advance tax ruling in relation to the pricing of goods supplied or services rendered to a connected person (transfer pricing) is not properly catered for. This exclusion would apply to an application that requests or requires a determination that –

- a) the price to be charged by the applicant for goods it may sell to a foreign subsidiary would reflect an arm's length price for purposes of the application of section 31 of the Income Tax Act, 1962;
- b) the price to be charged by the applicant for services it will supply to a controlled foreign company owned by it, would reflect an arm's length price as contemplated in section 9D(9)(b)(ii) of the Income Tax Act, 1962; or
- c) the consideration to be charged by the applicant in connection with a proposed disposal of an asset to a connected person in relation to the applicant reflects an arm's length price as contemplated in paragraph 38(1) of the Eighth Schedule to the Income Tax Act, 1962.

- d) In essence the ATR system cannot be used to request an advance pricing agreement or its equivalent.

SARS charges fees for advance tax rulings applications (application fees) and for the processing of the advance tax rulings (cost recovery fees) based on variable factors. Small businesses have reduced fees as an enabling concession. Advance tax rulings are published by SARS in a redacted form (without disclosing details of the taxpayer).

As mentioned, Action 14 of the OECD's BEPS Action Plan deals with making dispute resolution mechanisms more effective, like strengthening the effectiveness and efficiency of the MAP process to provide more certainty. South Africa has already committed to implementing and has implemented the minimum standard for Action 14, as adopted in 2015. It has also made other commitments (peer review and MAP statistics) as part of the OECD Inclusive Framework.

Dealing with transfer pricing issues constitutes 4 out of the 15 Actions in the OECD's BEPS Action Plan whilst APAs are dealt with briefly in 1 out of the 15 Actions. Transfer pricing skills are, therefore, critical to curtail BEPS, which is a major concern for developing countries, like South Africa. Transfer pricing skills are also essential to engage in APAs.

Whilst conceding the tax certainty advantages of APA programmes, a draft 2012 paper by the OECD Secretariat with the title *Advance Pricing Arrangements Approaches to Legislation*, notes the following with respect to their potential revenue yield:

"If a country has the capacity to carry out effective audits, it is unlikely that devoting resources to APAs will be more effective at raising revenue than employing resources on audits. This is because –

- it is arguable that only compliant taxpayers will apply for an APA,
- an effective audit programme can be targeted at the highest risk taxpayers,
- the threat of effective audit gives all taxpayers an incentive to voluntarily comply with the relevant transfer pricing rules."

The APA programme should draw on existing transfer pricing skills and on expertise from other sections at SARS. APAs should, in effect, serve as proactive administrative tools that assist in avoiding disputes (and the need for MAPs) in the future when it comes to transfer pricing.

4. Recommendations by the Davis Tax Committee

Following the announcement by the Minister of Finance in his National Budget Speech to set up a tax review committee, the Davis Tax Committee (DTC) was formed on 17 July 2013 to inquire into the role of South Africa's tax system in the promotion of inclusive economic growth, employment creation, development and fiscal sustainability. On the international front, the DTC was required to address concerns about BEPS, especially in the context of corporate income tax, as identified by the G20 and the OECD.

The DTC's reports recommend the implementation of an APA programme in South Africa but highlight capacity constraints at SARS in dealing with transfer pricing and APAs. The reports go as far as suggesting outsourcing on a temporary basis to obtain the necessary skills in these highly specialised areas. Unfortunately, no suggestions were made on how this would be funded

or how conflicts of interest within the very small transfer pricing community in South Africa would be managed.

5. International benchmarking

From an African perspective, Nigeria, Tanzania and Uganda have APA legislation in place. As at June 2017, Nigeria has not yet implemented its APA programme. According to a 2014 KPMG report, the tax authority in Tanzania has been hesitant to issue any APAs mainly due to a lack of transfer pricing capacity. As at October 2015, there were no known cases to report on in Uganda.

Despite the relative inactivity of APA programmes in other African countries, it appears that South Africa has fallen behind its peers on the African continent with regard to putting an APA programme in place. This is a dent to its status as a leader on the African continent and its position as a gateway for foreign investment into the rest of Africa.

Of the BRICS countries, Russia, India and China have APA legislation in place. As far as countries with similar tax legislation to South Africa go, Australia, Canada, New Zealand and the United Kingdom (UK) have APA legislation in place. Other countries that have APA legislation are Germany, Japan and the United States of America (USA). Japan has the oldest APA programme and has more than 40 officers dealing with APAs and MAPs.

Most OECD members have APA programmes. Non-OECD countries that have adopted APAs as at 2012 include Taiwan, Colombia, Egypt, Indonesia, Kazakhstan, Malaysia, Peru, Romania, Singapore and Venezuela.

The tax administrations of India and the USA charge fees for processing APAs. New Zealand charges an initial application fee for unilateral APAs. Canada and New Zealand recover “out of pocket” expenses incurred during the processing of an APA, for example, transport, accommodation and meals. Examples of countries that do not charge a user fee for bilateral APAs are Australia, Canada and the UK.

The number of bilateral APAs finalised by various countries are as follows:

- Canada – 279 as at 2017
- UK – 115 as at 2018
- China – 60 as at 2017
- India – 11 as at 2017

According to an October 2018 Deloitte report, *Indian Advance Pricing Agreement Programme Evaluation and Way Forward*, the median time to conclude bilateral APAs around the world are as follows:

- Canada – 49 months
- USA – 42 months
- India – 42 months
- Japan – 29 months
- the UK – 26 months

- Australia – 20 months

An APA may also cater for rollbacks, that is, it can apply to years of assessment before the date on which the APA takes effect. The period must be stipulated, for example, India has a maximum rollback period of four years in addition to its maximum five-year period for an APA. India and the UK do not allow for a rollback where there is a downward adjustment.

As per EU guidelines, an APA should take 18 to 24 months to conclude all four stages of pre-filing or informal application, formal application, evaluation of application, and formal agreement. By way of comparison, the minimum standards for Action 14 of the BEPS Action Plan require a MAP to be closed within 24 months of receipt on average. Based on international experience, bilateral APAs can take a long time to finalise (up to 49 months in Canada and 42 months in India) and generally have a lifespan of three to five years (excluding rollbacks).

Some commentators are now beginning to question the usefulness of APAs and would prefer to opt for joint international audits (as per a *TP Week and International Tax Review* article published on this on 4 June 2019) due to an ever increasing pace of change in the transfer pricing arena.

Details of APA programmes in specific countries can be found in **Annexure A**.

6. The way forward

Whilst it is clear that SARS is not ready to implement an APA system at this point in time, as it is still busy with building transfer pricing capacity, it can start with the planning and the drafting of the legislation for a bilateral APA system. Any such legislation will require the prior approval of National Treasury and the Minister of Finance.

Nevertheless it will take a few years to implement an APA system so it is important to start with the process as soon as is practical.

Although it is possible to use South Africa's DTAs that include the equivalent of Article 25 of the OECD model convention to implement a bilateral APA system without domestic tax legislation, this leaves a number of important questions open, which reduces certainty and increases the likelihood of disputes. South Africa should thus put legislation in place to underpin the system so as to make it more structured, as it did with its ATR system. As was noted above, most countries with APA programmes have supporting legislation in place. In order to provide SARS with enough time to build capacity and implement the APA system, the legislation should provide for a prospective effective implementation date determined by the Minister of Finance by notice in the *Government Gazette* and on a phased basis, so that lessons can be learned from the pilot programme.

SARS should commence with implementation as soon as the necessary resources are available and should make use of its e-filing system as an operational platform, as was done with advance tax rulings.

Once a bilateral APA programme is fully established, consideration can be given to extend the offering to cater for unilateral and multilateral APAs.

7. Legislative framework

South Africa should take the following into account in its legislative framework to implement an APA system:

- The Constitution of the Republic of South Africa, 1996 (the Constitution)
- Its policies and tax legislation on transfer pricing
- South Africa's DTA partners
- International benchmarking on implementing APAs
- Experiences with its ATR system
- Capacity constraints

Based on international benchmarking, the proposed legislative framework for an APA system in South Africa is as follows:

A. Definitions

The various terms used in the legislation should be defined, for example, "advance pricing agreement".

B. Purpose

The purpose of the APA system should be clearly articulated, for example, to provide for an advance pricing agreement programme that will promote tax certainty in respect of cross border transfer pricing transactions that will help minimise possible double taxation, double non-taxation and associated dispute resolution procedures.

C. Scope

In light of capacity constraints at SARS, the APA system should cater for bilateral APAs initially, with future consideration to add on unilateral and multilateral APAs.

An APA should be available in respect of any transaction or transactions that falls or fall within the scope of South Africa's transfer pricing rules (excluding domestic transfer pricing and transactions with persons that are not connected persons). This should be further refined by restricting applications based on certain criteria, for example, complexity of transactions regardless of monetary value (like in the UK) or transactions below or above a monetary threshold.

There are two broad areas that an APA could cover, namely, determination of arm's length pricing and the attribution of profits between parts of a single company, otherwise known as the attribution of profits to a permanent establishment. Currently advance tax rulings are not issued on whether or not business is carried on through a permanent establishment (the UK does not rule on this).

An area for consideration is the impact of an APA for customs and excise purposes.

D. Fees

In view of SARS's capacity and funding constraints, SARS may consider charging fees for processing APAs and could base this on the fee structure that it uses for advance tax rulings.

E. Confidentiality

Chapter 6 of the Tax Administration Act, 2011, provides far-reaching protection of taxpayer information and should be sufficient for purposes of an APA programme.

F. Application

It must be made clear as to who can apply for an APA, for example, residents and non-residents in respect of a future resident.

SARS then needs to decide on the minimum information that must be provided in an APA application, for example –

- a) a description of the taxpayer's activities, of its specified transactions and of the proposed scope and duration of the advance pricing arrangement, and an explanation of why the specified transactions fall within the scope of South Africa's transfer pricing legislation;
- b) a proposal by the taxpayer for the determination of arm's length transfer pricing for the transactions to be covered by the APA, in accordance with the arm's length principle contained in South Africa's transfer pricing legislation, describing the comparability factors that are regarded as significant to the specified transactions, the selection of the most appropriate transfer pricing method, and critical assumptions as to future events under which the determination is proposed;
- c) an identification of the associated enterprises that are parties to the specified transactions and where those enterprises are resident for tax purposes;
- d) details of any other country or countries the taxpayer wishes to participate in the agreement; and
- e) any other information SARS may prescribe by public notice.

If the applicant does not comply with the minimum requirements, SARS should reserve the right to reject the application.

SARS should be permitted to request additional information at any time and an applicant should be allowed to withdraw an application at any time.

G. Right to reject applications

Based on international experience, SARS should reserve the right to reject an APA application with appropriate reasons. Capacity constraints, confidentiality issues and risks to revenue collection should be key considerations in this area.

SARS may consider rejecting applications where one or more of the following are present:

- a) The actual conditions are simple or routine with arm's length conditions being relatively certain

- b) The value of the cross border dealings is not material
- c) The cross border dealings to be covered by the APA are only a small portion in terms of value of the total cross border dealings
- d) The proposed APA would not ensure there is alignment between true economic activity and profit outcomes in South Africa
- e) Collateral issues that affect the SARS's ability to enter into the proposed APA
- f) The arrangements that are the subject of the proposed APA appear to lack commerciality or are primarily tax driven, for example, the proposed APA covers activities that involve structures, restructuring or greenfield arrangements where the commercial benefits to the South African entity are questionable

H. Minimum information to be contained in an APA

A bilateral APA should be aligned with the MAP provisions in the DTAs.

South Africa should strive to include the following minimum information in its APAs:

- a) The names, addresses, tax reference numbers and countries of residence for taxation purposes of the parties to the APA
- b) The type of APA being entered into, for example, bilateral
- c) A definition of each of the key terms in the APA
- d) Terms of the APA
- e) The cross border dealings covered by the APA
- f) The agreed transfer pricing method and how it is to be applied
- g) The arm's length amount, rate, range or other arm's length outcome
- h) Critical assumptions
- i) A statement of the accounting standards on which the taxpayer's financial statements are based
- j) Procedures for making a compensating adjustment, if necessary
- k) The duration of the APA; with possible rollbacks

I. Binding effect of an APA

SARS should be bound to adhere to the terms and conditions in the APA when dealing with the taxpayer (no additional tax, penalties or interest in relation to transactions covered by the pricing arrangement in the APA) provided that the APA is complied with, there was no fraud, misrepresentation or non-disclosure of a material fact by the applicant, and the facts and circumstances, under which the APA was granted, did not change subsequent to the APA being finalised.

A taxpayer that is not party to an APA should not be able to rely on the APA.

J. Amendments to APAs

There should be room to amend APAs where specific circumstances change, provided that the change in circumstances is not due to negligence, carelessness or wilful default and SARS is informed as soon as is practically possible.

In the UK, the APA may provide for modification of its terms in specific circumstances, for example, a particular agreement may provide that where there has been a change which makes the agreed methodology difficult to apply, but which does not go as far as to invalidate a critical assumption, the agreement may be modified with the consent of the parties to resolve that difficulty. In such cases, the APA may be revised after consultations between the business and the tax authority and, in the case of bilateral agreements, the Competent Authority of the other country.

India also allows for amendments to APAs where there are changes, for example, to critical assumptions, provided that the applicant informs the tax authority timeously.

K. Annual compliance report

During the term of the advance pricing arrangement, the taxpayer should file an annual compliance report (usually with the taxpayer's tax return) which –:

- describes the taxpayer's actual activities for the period of the annual report;
- confirms that circumstances as per the APA application have not changed subsequently;
- demonstrates compliance with the terms and conditions of the APA; and
- confirms that the critical assumptions in the APA have been met.

L. APAs rendered void

APAs should be rendered void automatically under specific circumstances. For example, when it comes to revoking APAs in Australia, if it is established that –

- the taxpayer failed to materially comply with any terms or conditions of the arrangement; or
- there is a material breach of any of the critical assumptions; or
- there was a change in tax law, or DTA provisions, materially relevant to the arrangement,

the APA is revoked from the date of the failure, breach or change.

An APA should also be rendered void where it is found that there is fraud, misrepresentation or non-disclosure of a material fact in an application for an APA or in relation to any other requirement to maintain the existence of an APA.

M. Penalty for misrepresentation or omission or relevant information

Where there is fraud, misrepresentation or non-disclosure of a material fact in relation to an application for an APA, or in relation to any other requirement to maintain the existence of an APA, the question arises as to whether a penalty should be charged. The UK charges a penalty of not more than £10 000 in this regard.

N. Renewals

Where the facts and circumstances have not changed, the taxpayer should be permitted to request a renewal of an APA for an additional fixed period. The request for renewal should be made before the current APA expires (the time frame should be stipulated).

O. Procedures and guidelines for APAs

SARS should be allowed to issue procedures and guidelines for implementation and operation of the APA system.

P. Publication of APAs

Based on international benchmarking, it appears that countries do not publish APAs, even in an anonymised form, probably because APAs are more fact-specific as opposed to interpretation of law. A 1998 article by Hickman, K.E. in the *North Western Journal of International Law & Business* strongly advised the USA's revenue authority against starting a new practice of publishing APAs in light of calls for more transparency. The article mentions the following reasons for this advice:

- The unique nature of the operations of organisations around the world
- Confidentiality of taxpayer information
- Different perspectives of parties to bilateral APAs when it comes to publication
- The reluctance to apply for APAs in light of the publication of the APAs

Q. Agreements for the prevention of or relief from double taxation

The approval, amendment or renewal of a bilateral APA will have to be negotiated and agreed between the Competent Authorities of South Africa and the relevant DTA partner under the relevant article (MAP procedure) in the applicable DTA. As DTAs are incorporated into South African law by section 108 of the Income Tax Act, 1962, no further legislative intervention will be required in this regard.

8. Conclusion

Whilst foreign direct investment by multinationals in developing countries, like South Africa, is to be welcomed, developing countries should diligently guard against the erosion of their tax bases.

Tax certainty is one of the fundamental requirements for foreign direct investment. Since South Africa's ATR system does not cater for transfer pricing, an APA system should be implemented to promote tax certainty with regard to transfer pricing, but only after other priorities, like curtailing BEPS, and precursors, like building transfer pricing capacity, have been addressed.

It is estimated that it will take three to four years to implement an APA programme. In light of its limited capacity, South Africa should implement an APA programme gradually by using a phased approach but should commence with the process as soon as is practical. Enabling legislation for the programme is strongly advisable (international best practice) which will require a lead-time of between 18 to 30 months.

This document is published in order to obtain comment from interested parties. Due to the legislative process that needs to start early, timeframes are tight and comment are invited until 18 December 2020.

Annexure A – International benchmarking: Advance pricing agreements

India

2012 to 2017

1. APA Programme launched in 2012 via the Finance Act, 2012, through the insertions of sections 92CC and 92CD of the Income Tax Act, 1961.
2. Vide Notification No. 36/2012 (F. No. 133/5/2012-SO (TPL)]/SO 2005 (E), dated 30 August 2012, inserted the APA Scheme [Rules 10F to 10T]) in Income Tax rules to operationalise.
3. Dedicated APA teams working under the supervision of the International Taxation and Transfer Pricing Unit.
4. Before introducing APAs, India had an ATR system similar to South Africa's – it also did not accept applications for rulings on transfer pricing.
5. A sound transfer pricing audit base was critical before implementing APAs.
6. Where there are DTAs, Article 25(3) can only be exercised if there is an Article 9(2) in the DTA.
7. APAs are approved or ratified by the Minister of Finance as an APA is a sovereign document.
8. Preference for unilateral APAs where other countries do not allow for bilateral APAs. US allowed for bilateral APAs from 2016. There have been requests for conversion from unilateral to bilateral.
9. Available to any person entering into an International Transaction.
10. Not based on price but on methodology.
11. Transactional net margin method is the most popular transfer pricing method covered.
12. An APA is not binding for customs and excise purposes.
13. An APA without rollback runs for a maximum period of five years. May withdraw APAs before five years.
14. Allowed for rollbacks from 2015 (Finance Act (No.2) of 2014) – maximum of four years before first year of the APA period – thus a maximum of nine years for an APA. Note Circular No. 10 of 2015. No rollback if downward adjustment.
15. Bilateral APAs – six with UK and five with Japan – two for cars, four for telecoms, five for trading. Intra group services (32%) were most popular transactions.
16. All APAs due to worldwide entities as at 2017: USA (93), UK (55), Singapore (44), China (33).
17. More than 800 applications from 2012 to 2017. 85% were for unilateral APAs.
18. Until 31 March 2017, 152 APAs finalised over four years (141 unilateral and 11 bilateral). China finalised 113 in 10 years between 2005 and 2014.
19. Took 29 months on average to conclude a unilateral APA. Average time to conclude a bilateral APA is 39 months.

20. Most unilateral APAs were for the services sector (about 50% from IT and Banking or Finance).

21. Fees were charged. Fee depended on value of transactions. Highest fee – US\$ 40 000.

2017 to 2018

1. 219 APAs from 2012 to 2018.
2. 168 applications – 53 were for bilateral APAs.
3. 67 APAs signed – nine bilateral.
4. From 2017, would accept applications from all treaty partners.
5. 75% of applications were from USA, UK and Japan.
6. Average time to conclude unilateral APAs increased to 39 months. Average time to conclude a bilateral APA increased to 46 months – needed more staff and offices.
7. Backlog of five years to resolve disputes.
8. 219 APAs have resulted in additional income of US\$1,4 million translating into US\$ 420 million without litigation.
9. Positive experience in implementing APAs.

Overall Evaluation by Deloitte in 2018

1. After 6 years – nearly 1 000 applications and 240 APAs signed.
2. Dealt with international transactions within an MNE Group.
3. No applications for multilateral APAs – 788 for unilateral and 197 for bilateral.
4. Applications slow initially but picked up drastically after third year.
5. Fast progress – better than many treaty partners.
6. Applications were done manually, which created paper burden due to large documents that needed to be submitted – e-filing would have been better.
7. Needed more capacity with highly specialised transfer pricing skills to deal with growing applications and renewal of previous APAs.
8. Changing dynamics in the transfer pricing field required staff to be upskilled especially after recent BEPS or OECD developments.
9. Four teams operating in different parts of the country may have led to inconsistencies.
10. Needed to publish a Practice Note to provide guidance, like Australia did.
11. Renewals should have been fast tracked and should not have allowed for rollbacks.
12. Avoided delays due to duplication of work between APA unit and transfer pricing officers that conduct audits.
13. Needed synergies between info requested for APAs and automatic exchange of information.
14. Needed better safe harbour rules.

China

1. Implemented APA programme on a trial basis in 1990s. First unilateral APA in 1998. Signed first bilateral APA with Japan in 2005.
2. Formally introduced APA programme in 2002 in Article 53 of the *The Implementation Rules of the Tax Collection and Administration Law of the People's Republic of China*.
3. Issued Public Notice No. 6 to incorporate Action 14 of OECD BEPS Action Plan.
4. Guidance regarding the APA process and procedures is provided in Articles 46 through 63 of Guoshuifa (2009) No. 2.
5. Article 48 of Guoshuifa (2009) No. 2 states that APAs are generally available for companies that meet the following three criteria:
 - Their annual related-party transactions exceed RMB40 million for the three years before applying for the APA.
 - They fulfil their obligation to report related party transactions.
 - They prepare, maintain and provide contemporaneous documentation in accordance with the rules.
6. The transactional net margin method (TNMM) is the most common – 78%.
7. APAs run from 3 to 5 years. At the company's discretion, the method agreed in the APA can be rolled back to prior years. The maximum rollback period is 10 years.
8. An annual report must be submitted by the taxpayer.
9. No multilateral APAs have been signed.
10. The main transactions (65%) are “transfer of the right to use or ownership of intangibles”.
11. Mostly for the manufacturing sector – 84%.
12. As per Action 5 of OECD BEPS Action Plan, unilateral APAs signed after 1 April 2016 are subject to automatic exchange of information.
13. Most APAs are finalised within two years.
14. In 2017, 60% of bilateral APAs were concluded in one year and 40% took more than three years.
15. 40 bilateral APAs and 10 unilateral APAs were in the negotiation or review process as at 31 December 2017.
16. As of 2009, the Chinese revenue administration (SAT) concluded 12 bilateral APAs, and the signing countries included the US, Japan, Denmark and South Korea.
17. From 2005 to 2017, time to conclude bilateral APAs were: 50% in one year, 15% in one to two years, 15% in two to three years and 20% took more than three years.

18. In summary, signed 87 unilateral and 60 bilateral APAs from 2005 to 2017. From 2005 to 2008, signed 36 unilateral APAs and five bilateral APAs. A summary of APAs signed from 2009 to 2017 is depicted in the table below:

FINALISED	2009	2010	2011	2012	2013	2014	2015	2016	2017
Unilateral	5	4	8	3	11	3	6	8	3
Bilateral	7	4	4	9	8	6	6	6	5

Tanzania

1. Has APA legislation since 2014. Guide published in 2014.
2. Regulations updated in 2018.
3. Caters for unilateral, bilateral and multilateral APAs.
4. APAs run for three to five years. Allows for rollback for up to two years.
5. Need to file an annual compliance report.
6. Implemented – no dedicated unit in place – issues APA at its own discretion.
7. According to a KPMG report (2014), the tax authority had been hesitant to issue any APAs mainly due to a lack of transfer pricing capacity.

Uganda

1. Has APA legislation.
2. The Income Tax (Transfer Pricing) Regulations, 2011, allows a taxpayer to request the Uganda Revenue Authority to enter into an advance pricing agreement.
3. Caters for unilateral, bilateral and multilateral APAs.
4. Implemented – no specific process in place to obtain an APA.
5. As at October 2015, there were no known cases to report on.

Nigeria

1. Caters for unilateral, bilateral and multilateral APAs.
2. Legislation – Regulation 7 of the Income Tax (Transfer Pricing) Regulations No. 1, 2012.
3. No threshold for applying for an APA.
4. Not yet implemented as at June 2017.

United Kingdom (UK)

1. The UK APA programme has been in place within a statutory framework since 1999, before which time APAs were agreed to using the mutual agreement procedure of the relevant treaty.
2. Caters for unilateral, bilateral and multilateral APAs but prefers bilateral.

3. Legislation relating to APAs, formerly found at section 85 of the Finance Act 1999, was rewritten as part of the UK's Tax Law Rewrite Project and now appears at sections 218 to 230 of the Taxation (International and Other Provisions) Act 2010 ("TIOPA 2010"). In addition, HM Revenue and Customs (HMRC) recently issued a new Statement of Practice (SP) SP2/10 to provide guidance on how HMRC interprets the new APA legislation and applies it in practice.
4. The same legislation is used as the basis for advance thin capitalisation agreements.
5. Sub-section 218(2), TIOPA 2010, sets out the transfer pricing issues that can be the subject matter of an APA. An APA can be used to resolve questions relating to the following broad situations giving rise to transfer pricing issues:
 - Transfer pricing between separate business enterprises where questions may arise as to the determination of the arm's length provision under the rules in Part 4 TIOPA 2010.
 - Attribution of income or profit between parts of a business enterprise which operates in more than one country where questions may arise as to the taxable income to be recognised in any such part.

Note:

This is conceptually a similar problem to transfer pricing and any references to 'transfer pricing issues' in the remainder of this document should be read as including such attribution issues.

- Across the UK oil-related ring-fence.
6. Approach: Complex transactions vs non-complex transactions. APAs will not be declined solely by reference to the size of the transactions giving rise to the transfer pricing issues, because HMRC recognises that complex transfer pricing issues can be encountered by smaller businesses as well as by large multinationals. However, many small and medium enterprises are exempt from the UK transfer pricing legislation by virtue of section 166 of the TIOPA 2010 and so there may be limited occasions where the APA process will be appropriate for smaller businesses.
 7. In accordance with section 225 of the TIOPA 2010, an APA may be revoked by HMRC in accordance with its terms, where the business does not comply with the terms and conditions of the agreement, or where the identified critical assumptions cease to be valid.
 8. An APA may be requested by –
 - any UK business, including a partnership, with transactions to which the provisions of Part 4 of TIOPA 2010 apply (the UK transfer pricing rules);
 - any non-resident trading in the UK through a permanent establishment; or
 - any UK resident trading through a permanent establishment outside the UK.
 9. There are two broad areas an APA covers, namely –
 - determination of arm's length pricing; and
 - the attribution of profits between separate parts of the business.

Note, however, that the APA legislation does not provide for a determination that a permanent establishment (PE) either does or does not exist.

10. The APA legislation also does not provide for a determination of the potential impact of the diverted profits tax (DPT).
11. As unilateral APAs are generally of less value to both HMRC and potential applicants and provide less transparency, applications for unilateral APAs are less likely to be accepted into the APA programme.
12. Typically, an APA term is from 3 to 5 years, and a longer term will only be considered in exceptional circumstances. There is no rollback for a downward adjustment.
13. HMRC aims to complete the APA process within 18 to 21 months from the date of the formal submission.
14. Annual reports should demonstrate – in a concise format – whether the business has complied with the terms and conditions of the APA.
15. Where the facts and circumstances have not changed, the business may request renewal of an APA for an additional fixed period – ideally not later than six months before the expiry of its current term.
16. HMRC strongly favours negotiating either bilateral or multilateral advance pricing agreements, except where –
 - the relevant jurisdiction is not signatory to a tax treaty with the United Kingdom;
 - a treaty partner has no established advance pricing agreement programme; or
 - HMRC considers that there is little to be gained by seeking a bilateral agreement.
17. Applications received:
 - 2012 – 32
 - 2013 – 45
 - 2014 – 43
 - 2015 – 66
 - 2016 – 47
 - 2017 – 32
18. As at 31 March 2017, the transfer pricing team comprised 82 members.
19. HMRC does not levy any charge on the business for their assistance during the APA process.

Australia

1. Had APA programme since 1995 – caters for unilateral, bilateral and multilateral APAs.
2. An APA deals with conditions operating between entities that satisfy the cross border test in subsection 815-120(3) of the Income Tax Assessment Act, 1997 (cross border dealings).
3. Eligibility on a case-by-case basis.
4. APA cycle time is 24 months.

5. APA generally covers a period of three to five years and may be reviewed if trading circumstances change materially.
6. There is room for rollbacks, depending on the taxpayer's circumstances. However, matters involving earlier income years are to be resolved using an active compliance product. Any decision on rollback for years before an APA is made on a risk assessment basis.
7. APAs are subject to an annual reporting requirement.
8. No separate transfer pricing or APA team. Transfer pricing is considered business as usual; APA work done by CA unit, economist practice and general audit.
9. Out of 11 applications, only one multilateral APA was finalised – completed in 2017/18.
10. No fee charged.

Total APA applications as at 30 June:

APPS	2012	2013	2014	2015	2016	2017	2018
Unilateral	35	40	35	45	36	40	33
Bilateral	31	23	23	26	32	32	37

Total APAs finalised as at 30 June:

FINALISED	2012	2013	2014	2015	2016	2017	2018
Unilateral	22	26	14	19	22	6	12
Bilateral	32	10	21	12	19	10	11

Average time (months) to complete APAs as at 30 June:

MONTHS	2014	2015	2016	2017	2018
Unilateral	11	12	10	24	28
Bilateral	30	20	16	31	36

New Zealand

1. Transfer pricing legislation was first introduced in New Zealand on 12 December 1995.
2. Implemented in 1999/2000.
3. The transfer pricing guidelines were issued in their final form by the Inland Revenue Department (IRD) in October 2000 (Inland Revenue, 2015d).
4. Caters for unilateral, bilateral and multilateral APAs.
5. Strong emphasis on intangibles.
6. Unilateral APAs are issued in the form of binding rulings. Although unilateral APAs are one-sided, should double taxation arise on transactions covered by a unilateral APA, New

Zealand will enter into competent authority negotiations with the other jurisdiction based on the unilateral APA position.

7. Bilateral or multilateral APAs are entered into in accordance with New Zealand's tax treaties. As at 2016, the New Zealand tax administration maintained an informal APA process, where all MNE applicants are welcome to apply regardless of complexity, size or degree of risk involved in any of their transactions proposed to be covered under the APA.
8. Taxpayers who are party to an APA are required to submit an annual report demonstrating their compliance with the terms of the agreement.
9. An internationally agreed OECD standard requires the exchange of certain details of unilateral APAs with tax treaty partners. The IRD has implemented this standard with application to unilateral APAs that have been issued on or after 1 January 2010 and were still in effect as from 1 January 2014.
10. New Zealand's transfer pricing environment is managed by a small team of transfer pricing specialists, the Specialist Advice Unit. The team comprises an international revenue strategy manager, investigations and advice manager, four principal advisors and an economist
11. 129 APAs have been concluded as at 30 June 2015, up from 45 APAs completed in 2009.
12. 182 APAs finalised as at 30 June 2018.
13. An initial application fee, as outlined in the Application for Private Ruling IR713 form, is payable on filing the formal application for a unilateral APA. The tax administration usually does not charge for entering into bilateral or multilateral APAs. If any overseas travel is involved in completing an APA, the tax administration will seek to recover "out of pocket" costs (like transport, accommodation and meals) on an actual and reasonable basis from the taxpayer.

Canada (as at 2017)

1. Commenced in 2001.
2. Caters for unilateral, bilateral and multilateral APAs.
3. Eligibility on a case-by-case basis. Rollbacks are allowed.
4. It is the scope and complexity of a case and not the size of the covered transaction(s) or companies involved, along with other factors such as a taxpayer's co-operation and the availability of necessary quality information, that determine the length of time required to complete an APA.
5. The transactional net margin method (TNMM) continued to be the most frequently employed transfer pricing methodology. A TNMM was proposed in 70% of APAs in process.
6. Canada APA teams include accountants, financial analysts, economists and lawyers.
7. Based on the number of pre-file meetings held with taxpayers in 2017, the Canadian Revenue Authority (CRA) had 24 applicants to the programme that year. There were no multilateral APAs completed in 2017.
8. Of all cases in process as at 31 December 2017, 88% involved taxpayers seeking an APA on a bilateral or multilateral basis, as opposed to 12% of taxpayers seeking an APA on a

unilateral basis. Cases involving transfers of tangible property made up more than half of APAs in process (58%). Cases involving intangible property represented 19%, intra-group services represented 19% and financing represented 4%.

9. APAs involving taxpayers with operations in the automobile and other transportation equipment sector represented 25% of APAs in process at the end of the year. APAs pertaining to the metals and minerals sector were the second most prevalent, representing 12% of the cases in process. APAs pertaining to the petroleum, health, and food and beverages industries each represented 9% of cases in process.
10. In 2017, the CRA was engaged in bilateral or multilateral APA processes involving taxpayers from 15 different jurisdictions. After the US, the other tax jurisdictions are United Kingdom, Switzerland, Japan, South Korea, Germany, Netherlands, Ireland, India, Sweden, China, Denmark, Chile, France, and Hong Kong.
11. The breakdown of bilateral and multilateral APAs by country continues to reflect the significant flow of goods and services exchanged between Canada and the US. Since the programme started, the CRA has completed 202 (or 72%) bilateral APAs with the USA of the 279 successfully completed bilateral APAs. At the end of 2017, there were 55 cases in process involving the US. At the end of 2017, APAs involving the USA represent 53% of all APAs in process.
12. The year 2017 opened with an active case inventory of 90 APAs. Accepted into the programme were 16 new cases, three cases were withdrawn, and 36 cases were completed. This resulted in a closing inventory of 67 cases for 2017.
13. No fee charged; only out of pocket travel costs for the tax administration's employees.

Total APAs finalised:

FINALISED	2013	2014	2015	2016	2017
Unilateral	3	2	1	3	6
Bilateral	21	23	30	21	30

Average time (months) to complete APAs as at 30 June:

MONTHS	2013	2014	2015	2016	2017
Unilateral	36	46	71	15	13
Bilateral	52	48	48	53	49

United States of America (USA)

1. Many studies show that the USA's APA process is perhaps one of the most advanced and detailed in the world.
2. The USA implemented an APA programme in 1991.
3. Only allowed for bilateral APAs from 2016.
4. Approach: Strategic transactions vs non-strategic transactions.

5. As a general note, the USA has a particular preference to conclude bilateral and multilateral APAs over unilateral APAs.
6. Where a taxpayer requests a unilateral APA to cover issues that could be covered under a bilateral or multilateral APA, the taxpayer must explain why a unilateral APA is more appropriate to cover those issues.
7. In the USA, the arm's length principle is the accepted basis for determining an appropriate transfer price.
8. The arm's length principle has been incorporated in regulations under section 482 of the Internal Revenue Code (IRC).
9. One of the significant changes under Rev. Proc. 2015-41 is in relation to rollbacks (Deloitte, 2015). Section 5.02(1) of the Rev. Proc 2015-41 'Rollbacks' states that –

“an APA is primarily a means to resolve coverable issues for prospective years. However, an APA may apply the covered methods (with appropriate modifications, if necessary) to one or more earlier, rollback years”.
10. Can request to include rollback years on any APA request.
11. An APA annual report must be filed for each APA year. The USA's tax administration, the Internal Revenue Service (IRS), maintains the power to cancel or revoke an APA for failure to file an annual report that is timely, complete and accurate.
12. The USA has managed an average timeline of 34 months for unilateral APAs and 51 months for bilateral APAs in 2016.
13. The IRS charges a user fee for APA applications.
14. As at 2016, in general, the user fee for an APA request was US\$60 000 unless it was a small business APA request, in which case it was US\$30 000.

Annexure B – List of references

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