

DOMESTIC TRANSFER PRICING: A COMPREHENSIVE ANALYSIS

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I. INTRODUCTION:

Transfer prices are defined as ‘the prices at which an enterprise transfers physical goods and intangibles or provides services to associated enterprises’¹. Whenever a transaction takes place between two entities, whether related or unrelated, a price has to be fixed. This fixing of prices for transactions between associated enterprises is known as transfer pricing. The concept of transfer pricing was incorporated into the Income Tax Act, 1961 by the Finance Act 2001 based on the report submitted by an ‘Expert Group on Transfer Pricing’, set up by the Central Board of Direct Taxes (CBDT). However, the applicability was limited to only ‘international transactions’. Recently the Finance Act 2012 has enlarged the scope of transfer pricing by extending its ambit to ‘*specified domestic transactions*’. The provisions will be applicable from the financial year 2013-2014 where the aggregate value of transactions exceed Rs.5 crore. By extending the transfer pricing provisions to SDT, pricing of these transactions will need to be determined with regard to the *arm’s length principles* using the methods prescribed under the Act.

II. INTRODUCTION TO DOMESTIC TRANSFER PRICING IN INDIA AND THE PURPOSE OF AMENDMENT

The Hon’ble Supreme Court of India in the case of *GlaxoSmithKline vs. ACIT*² had rendered a recommendation to the CBDT to expand the scope of transfer pricing to specified domestic transactions covered under sections like section 40 A(2) and section 80IA(10) of the Act, in order to reduce the increasing litigations on such complicated subject. In domestic transactions, the under-invoicing of sales and over-invoicing of expenses ordinarily will be revenue neutral in nature, except in two circumstances having tax arbitrage such as where one of the related entities is (i) loss making or (ii) liable to pay tax at a lower rate and the profits are shifted to such entity. The Court had observed that the CBDT should examine whether Transfer Pricing Regulations can be applied to domestic transactions between related parties u/s 40A(2) by making amendments to the Act. The AO can be empowered to make adjustments to the income declared by the assessee having regard to the fair market value of the transactions between the related parties and can apply any of the generally accepted

¹ Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration, OECD, 1995

² (2010) 195 TAXMAN 35

methods of determination of arm's length price, including the methods provided under Transfer Pricing Regulations. The government on accepting such recommendation had brought in the concept of domestic transfer pricing vide the Finance Act, 2012.

III. **PERSONS COVERED BY SPECIFIED DOMESTIC TRANSACTIONS:**

- (i) Individual
- (ii) Company
- (iii) Hindu Undivided Family members
- (iv) Firms
- (v) Association of persons

IV. **MEANING OF SPECIFIED DOMESTIC TRANSACTIONS :**

Section 92BA³ of the Income Tax Act, 1961 specifies the meaning of 'specified domestic transactions' as the following transactions, not being an international transaction, namely:-

- (i) *any expenditure in respect of which payment has been made or is to be made to a person referred to in clause (b) of sub-section (2) of section 40A;*
- (ii) *any transaction referred to in section 80A;*
- (iii) *any transfer of goods or services referred to in sub-section (8) of section 80-IA*
- (iv) *any business transacted between the assessee and other person as referred to in sub-section (10) of section 80-IA;*
- (v) *any transaction, referred to in any other section under Chapter VI-A or section 10AA, to which provisions of sub-section (8) or sub-section(10) of section 80-IA are applicable; or*
- (vi) *any other transaction as may be prescribed,*

³ Inserted by Finance Act,2012 w.e.f.1-4-2013

and where the aggregate of such transactions entered into by the assessee in the previous year exceeds a sum of five crore rupees.

DETAILED ANALYSIS OF SPECIFIED DOMESTIC TRANSACTIONS

V. **Any expenditure in respect of which payment has been made or is to be made to a person referred to in clause (b) of sub-section (2) of section 40A**

Section 40A :‘Expenses or payments not deductible in certain circumstances’.

Section 40A(2)(a) states that ‘where the assessee incurs any expenditure in respect of which payment has been or is to be made to any person⁴ referred to in clause (b) of this sub-section, and the [Assessing] Officer is of opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him therefrom, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction.

***Provided** that no disallowance, on account of any expenditure being excessive or unreasonable having regard to the fair market value, shall be made in respect of a specified domestic transaction referred to in section 92BA, if such transaction is at arm's length price as defined in clause (ii) of section 92F⁵.*

The provision clearly states that the transactions between the persons’ mentioned in sub-clause (b) of section 40A(2) will be scrutinized by the assessing officer and if he is of the opinion that such expenditure is ‘unreasonable’ or ‘excessive’, having regard to the fair market value of goods or services, so much of the expenditure which he considers as excessive or unreasonable shall not be deducted.

Section 40A (2)(b) does not include ‘**income receipts**’ from the related parties. In the case of *Commissioner of Income Tax v. Subbaraya Chetty & Sons*⁶, the High Court of Madras observed that section 40A(2)(a) is applicable only when there was an expenditure. The mere fact that the goods were sold at a concessional rate (discount) to benefit the purchasers at the

⁴ Infra note 8

⁵ Inserted by Finance Act, 2012, w.e.f.1-4-2013

⁶ (1980) 123 ITR 592 (Mad)

expense of the company would not entitle the income-tax department to assess the difference between the market price and the price paid by the purchasers as profit of the seller and thus it was held that there was no expenditure which could be disallowed by reference to s. 40A (2) (a).

In the case of *Durga Rice & Gen Mills v. AO*⁷, section 40A(2) of the Act cannot be applied for making addition for the difference in value of sales made to domestic related party and section 40A(2) of the Act is restricted to disallowance of expenditure value. Thus, the section doesn't include income receipts.

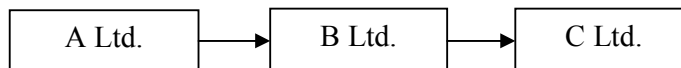
1. MEANING OF SUBSTANTIAL INTEREST

Explanation:- (a) in a case where the business or profession is carried on by a company, such person is, at any time during the previous year, the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) carrying not less than twenty per cent of the voting power; and

(b) in any other case, such person is, at any time during the previous year, beneficially entitled to not less than twenty per cent of the profits of such business or profession⁸.

In this regard, the explanation of 'substantial interest' is very general with respect to the relationships covered by SDT. An issue may arise whether the beneficiary ownership of shares as referred in Explanation to section includes the '*derivative relationship*'.

Illustration: If A has substantial interest in B and B has substantial interest in C. Whether A has got substantial interest in C is unanswered.



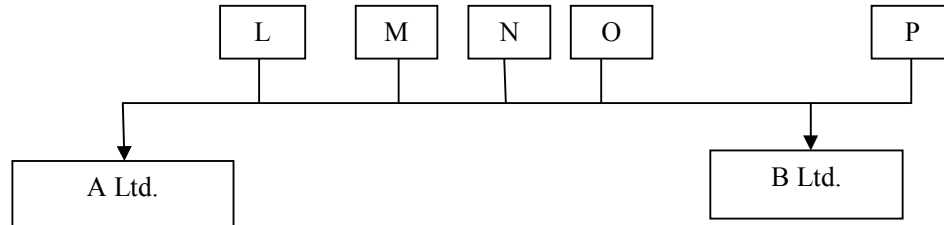
Another issue which may arise is where an entity is held through a related party like director, whether 20% threshold needs to be examined qua an individual director or qua all directors put together.

⁷ TS-446-ITAT-2012

⁸ Section 40A(2)(b)

Illustration: All directors of A Ltd. may be shareholders in B Ltd. such that individual shareholding of each director does not exceed the threshold of 20% but the aggregate shareholding of all directors put together exceeds 20%. Whether B Ltd. can be regarded as related party to A Ltd. in such scenario?

Consider the following relationship: 10% 10% 10% 10% 60%



2. **PERSONS COVERED UNDER SECTION 40A (2)(b) OF THE INCOME TAX ACT, 1961⁹:**

(i) ***Where the assessee is an individual, ‘any relative’ of the assessee;***

The term ‘any relative’ has not been defined in section 40A of the Act. Thus, the term ‘relative’ must be construed as the one given in Section 2(41)¹⁰ of the Act which means the ‘husband, wife, brother or sister or any lineal ascendant or descendant of that individual’. Thus on any literal interpretation, the term relative as per this section will be restricted to this definition. The definition given in section 56 for ‘relative’ cannot be interpolated into this section.

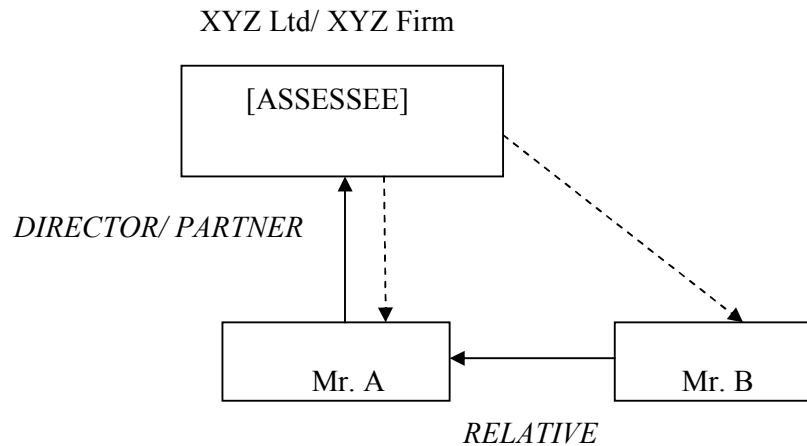
Illustration: ‘A’ is a shoe manufacturer and purchases leather from his brother-in-law for 10 crores. This transaction doesn’t come under the purview of specified domestic transaction as brother-in-law is not a ‘relative’ according to section 40A (b) (i).

(ii) ***Where the assessee is a company, firm, association of persons or Hindu undivided family, any director of the company, partner of the firm, or member of the association or family, or any relative of such director, partner or member;***

⁹ Inserted in sub-section 2 (b)

¹⁰ Amended by Finance Act,2009

Illustration depicting clause (ii) of section 40(2)(b) where assessee is a company or firm



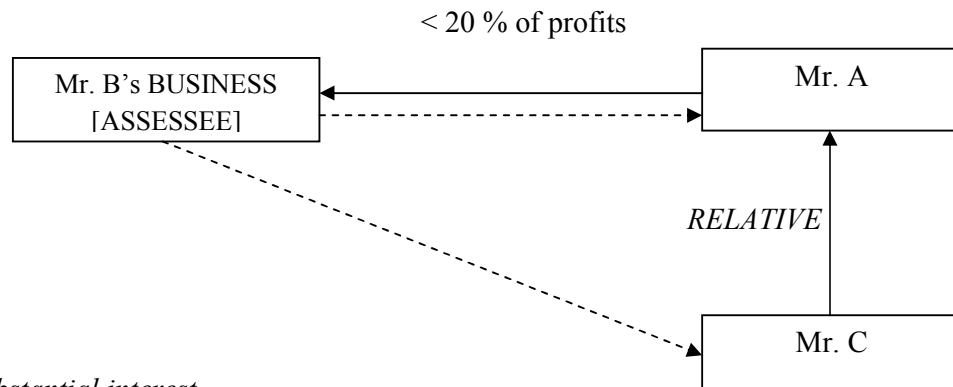
—————▶ Substantial interest
 - - - - -▶ Specified Domestic transactions

Illustration: 1. Supply Ltd. had purchased a Rolls Royce for Rs. 5 crores for the director’s use. Since it is not for legitimate needs of business of the company, such expenditure shall be disallowed by the Assessing Officer.

2. Mr. Akash, brother of director Rahul was paid a salary of Rs. 20 Lakh per month for the post of sales manager by Raintree Ltd. In case the Assessing officer is of the opinion that the expenditure is unreasonable or excessive and the aggregate of transactions had crossed the threshold of Rs 5 crores, then expenditure shall be computed in accordance with arm’s length price.

(iii) Any individual who has a substantial interest in the business or profession of the assessee, or any relative of such individual;

Illustration depicting clause (iii) of section 40A(2)(b)



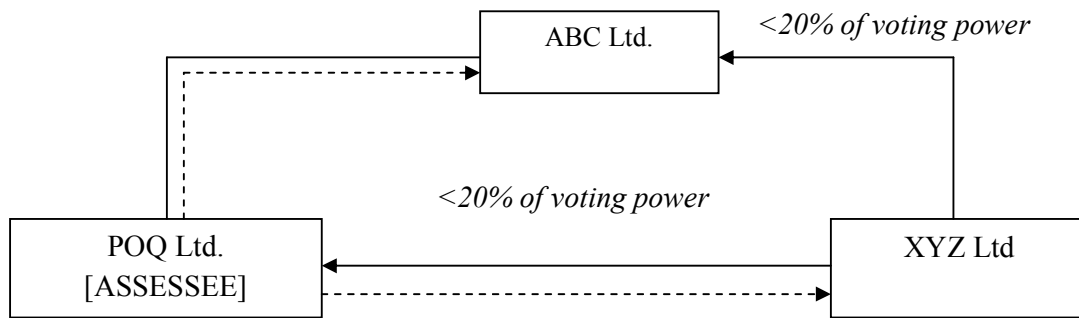
—————▶ Substantial interest
 - - - - -▶ Specified Domestic transactions

Explanation: Mr. A has a substantial interest in B's business. The expenditure made to Mr. A or Mr. B [Relative of Mr. A] is a specified domestic transaction.

Example: Mr. Akshay has a substantial interest in Mr. Ravi's business. Mr. Akshay is appointed as a sales agent for which he is paid a commission of Rs. 5 crores. This transaction will be covered by DTP and thus the expenditure will be computed in accordance with arm's length price.

(iv) A company, firm, association of persons or Hindu undivided family having a substantial interest in the business or profession of the assessee or any director, partner or member of such company, firm, association or family, or any relative of such director, partner or member or [any other company carrying on business or profession in which the first mentioned company has substantial interest]¹¹;

Scenario 1: Illustration depicting the transaction between a company and another company in which it has got a substantial interest



—→ Substantial interest
 - - - - -> Specified Domestic transactions

Explanation: POQ Ltd [Assessee] is a company in which XYZ Ltd holds more than 20% of the voting power. XYZ Ltd holds more than 20% of the voting power in ABC Ltd. So transactions between POQ Ltd and ABC Ltd will be a specified domestic transaction.

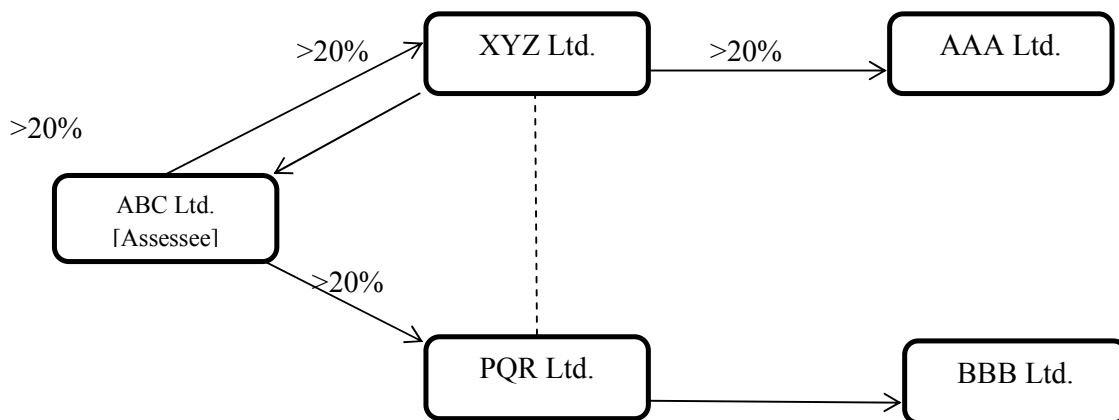
Illustration: 1. Universal Ltd., a company of Beethoven group, is a manufacturer of engines for transport vehicles. Sonic Ltd., another company of the same group supplies materials for Rs. 48 crores to Universal Ltd. The expenditure towards purchase of goods from Sonic Ltd.

¹¹ Inserted by the Finance Act, 2012, w.e.f. 1-4-2013

must be computed in accordance with arm's length price as Sonic Ltd comes under the term 'person' as per section 40A(2)(b)(iv). The value of purchases was computed to be Rs. 30 crores as per the CUP method by using external comparable. Thus, the excess expenditure of Rs. 18 crores shall be disallowed by the Assessing officer.

2. Global Ltd is the parent company having three subsidiaries namely Healthcare Ltd, Fruit Shop Ltd and Global Consultancy Services Ltd. Healthcare Ltd. is the Assessee and it had purchased a software product to support certain medical instruments from Global Consultancy Services Ltd. for a sum of Rs. 10 crores. The transaction will be covered by SDT because GCS Ltd is a person covered under the term 'any person' according to this sub-section and thus the expenditure shall be computed in accordance with arm's length price.

3. Companies having same parent or holding company



ABC Ltd. has two subsidiaries XYZ Ltd. and PQR Ltd. Further these subsidiaries have AAA Ltd. and BBB Ltd. respectively as their subsidiaries, the following transactions will fall under section 40A (2):

- (i) ABC Ltd – XYZ Ltd,
- (ii) ABC Ltd – PQR Ltd &
- (iii) XYZ Ltd – PQR and

However, transactions between

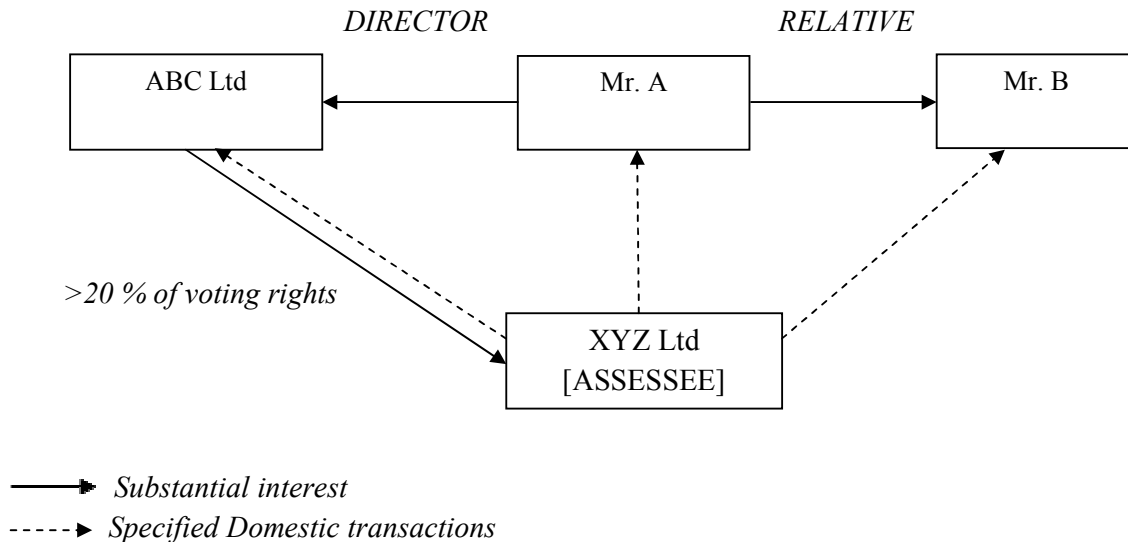
- (i) ABC Ltd – BBB Ltd

(ii) ABC Ltd – AAA Ltd

(iii) AAA Ltd – BBB Ltd

will not come under 40A(2).

Scenario 2: Illustration depicting clause (iv) of section 40A(2)(b)

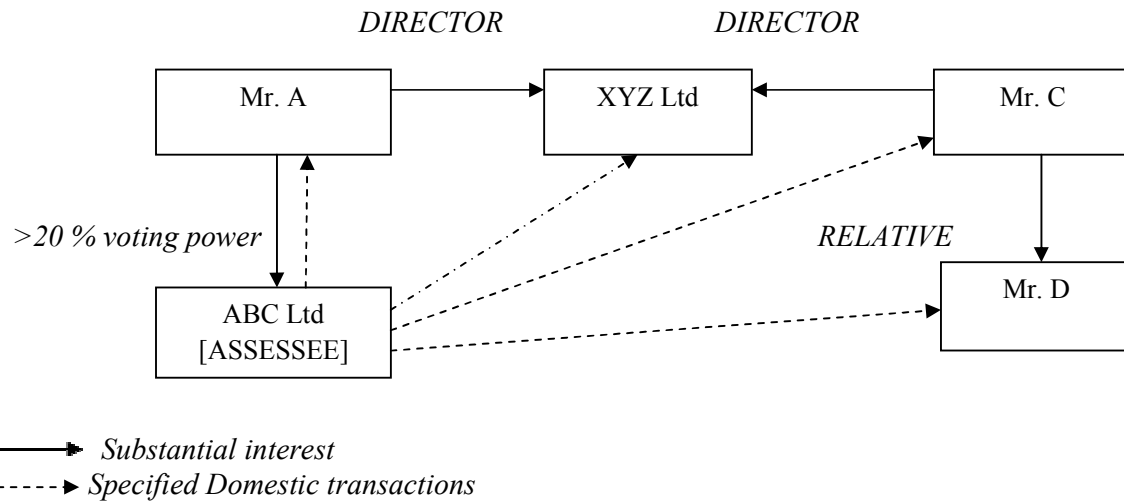


Explanation: ABC Ltd has a substantial interest in XYZ Ltd. A is the director of ABC and B is the relative of A. The transaction between XYZ Ltd and A, between XYZ and B will be covered by SDT.

Illustration: Konark Ltd. has a substantial interest in Mount Peak Ltd. An opinion is rendered by Mr. Prakash, one of the directors of Konark Ltd. and a consultation fee of Rs. 75 Lakhs is paid for the same. This transaction will be covered by SDT if the aggregate of all transactions cross a threshold limit of Rs.5 crore thereby, computing the fee in accordance with the ALP.

(v) company, firm, association of persons or Hindu undivided family of which a director, partner or member, as the case may be, has substantial interest in the business or profession of the assessee; or any director, partner or member of such company, firm association or family or any relative of such director, partner or member;

Illustration depicting clause (v) of section 40 A(2) (b)



Explanation: A has a substantial interest in ABC Ltd. [Assessee] and he is also a director in XYZ Ltd. The transaction between ABC and XYZ will be covered by SDT. C is a Director in XYZ Ltd., the transaction between ABC Ltd. and C as well his relative 'D' will be covered by SDT.

Illustration: 1. Mr. Thomas owns 22% of equity shares in Cook Ltd. [ASSESSEE] and he is also a director in Tinytots Ltd. Tinytots has rented its building to Cook Ltd. for a sum of Rs. 20 crores per annum. This transaction will be covered by DTP and the expenditure of the assessee towards the payment of rent shall be computed in accordance with arm's length price.

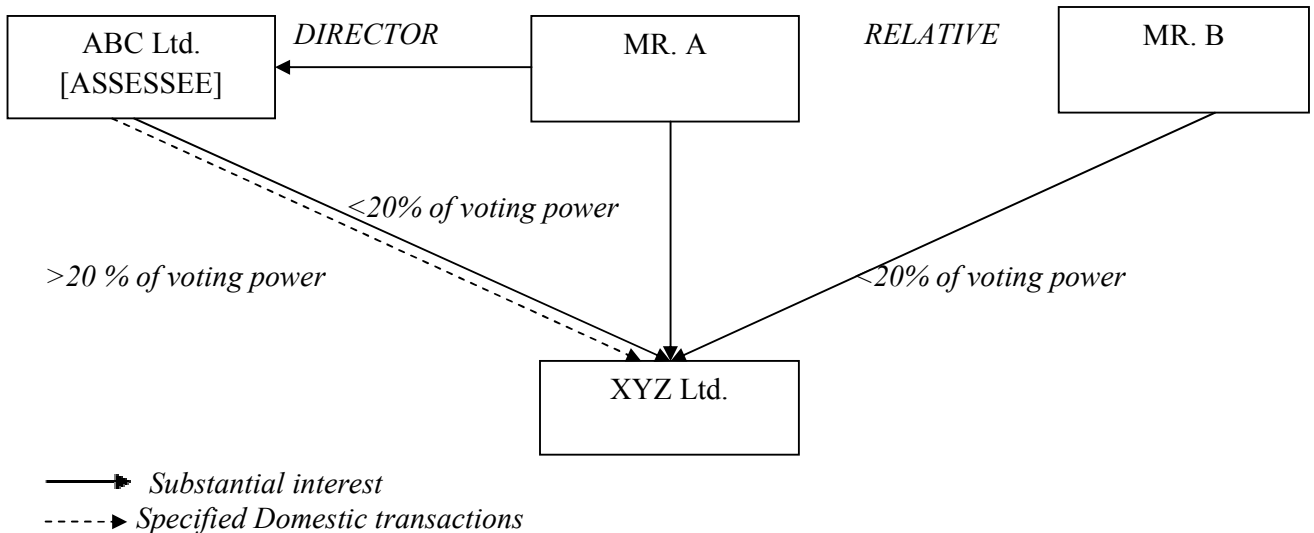
2. Vyas Ltd. had rendered a loan of Rs. 20 crores with an annual interest of 30% to Bharath Ltd[ASSESSEE]. Mr. Vyas is a director in Bharath Ltd. and holds 21% of equity shares in Vyas Ltd. The expenditure on interest paid by the assessee is subject to DTP and thus it shall be computed with the arm's length price.

(vi) **any person who carries on a business or profession,-**

(A) where the assessee being an individual, or any relative of such assessee, has a substantial interest in the business or profession of that person; or

(B) where the assessee being a company, firm, association of persons or Hindu undivided family, or any director of such company, partner of such firm or member of the association or family, or any relative of such director, partner or member, has a substantial interest in the business or profession of that person.

Illustration depicting clause (vi) of section 40A(2)(b)



Explanation: The Assessee ABC Ltd. has a substantial interest in XYZ Ltd. The transactions between XYZ and ABC, XYZ and Mr.A[Director of ABC], Mr. B[Relative of A] and XYZ are all covered by SDT.

Illustration: Kartik the director of Kartik Ltd.[Assessee] has a substantial interest in Angel Ltd. Materials were purchased from Angel Ltd. for a sum of Rs.10 crores. This expenditure shall be computed in accordance with the arm’s length price.

VI. **Any transaction referred to in section 80A**

Section 80A (6) states that ‘ Notwithstanding anything to the contrary contained in section 10A or section 10AA or section 10B or section 10BA or in any provisions of this Chapter under the heading "C—Deductions in respect of certain incomes", where any goods or services held for the purposes of the undertaking or unit or enterprise or eligible business are transferred to any other business carried on by the assessee or where any goods or services held for the purposes of any other business carried on by the assessee are transferred to the undertaking or unit or enterprise or eligible business and, the consideration, if any, for such transfer as recorded in the accounts of the undertaking or unit or enterprise or eligible business does not correspond to the market value of such goods or services as on the date of the transfer, then, for the purposes of any deduction under this Chapter, the profits and gains of such undertaking or unit or enterprise or eligible business shall be computed as if the transfer, in either case, had been made at the market value of such goods or services as on that date’.

Explanation.—For the purposes of this sub-section, the expression "market value",-

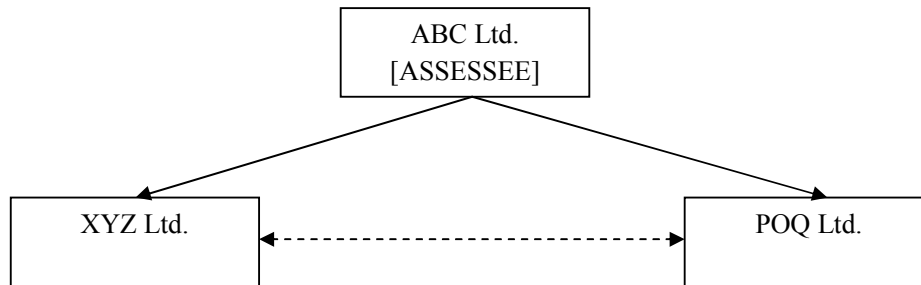
(i) in relation to any goods or services sold or supplied, means the price that such goods or services would fetch if these were sold by the undertaking or unit or enterprise or eligible business in the open market, subject to statutory or regulatory restrictions, if any;

(ii) in relation to any goods or services acquired, means the price that such goods or services would cost if these were acquired by the undertaking or unit or enterprise or eligible business from the open market, subject to statutory or regulatory restrictions, if any.]

(iii) in relation to any goods or services sold, supplied or acquired means the arm's length price as defined in clause (ii) of section 92F of such goods or services, if it is a specified domestic transaction referred to in section 92BA¹².

¹² Inserted by Finance Act,2012 w.e.f.1-4-2013

Illustration depicting the transfer of goods and services by one company of the assessee to its other company.



—→ Any other company of the assessee
 - - - - -→ Specified Domestic transactions

In such circumstances, the transfer of goods and services to any other company of the assessee comes under the purview of section 92BA and the transfer is to be determined in accordance with Arm’s Length Price. This provision widens the scope of DTP as it includes eligible and non-eligible enterprises.

VII. Any transfer of goods or services referred to in sub-section (8) of section 80-IA

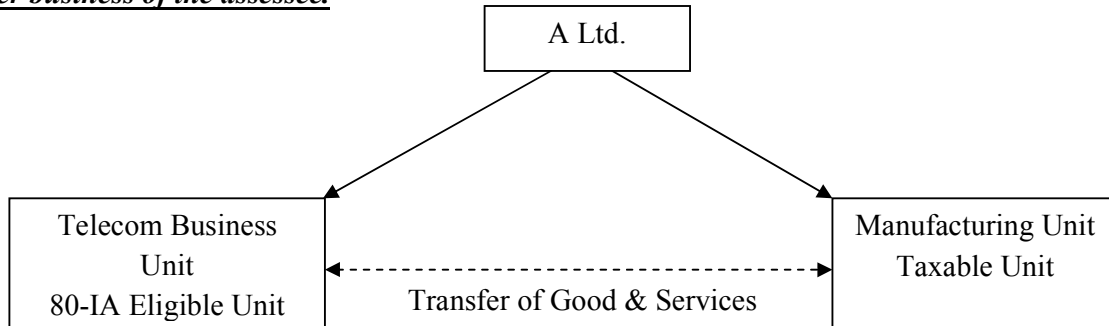
*Section 80IA(8) of the Act states that “Where any goods or services held for the purposes of the **eligible business are transferred to any other business carried on by the assessee, or where any goods or services held for the purposes of any other business carried on by the assessee are transferred to the eligible business and, in either case, the consideration, if any, for such transfer as recorded in the accounts of the eligible business does not correspond to the market value of such goods or services as on the date of the transfer, then, for the purposes of the deduction under this section, the profits and gains of such eligible business shall be computed as if the transfer, in either case, had been made at the market value of such goods or services as on that date :***

Explanation.—*For the purposes of this sub-section, “market value”, in relation to any goods or services, means—*

(i) *the price that such goods or services would ordinarily fetch in the open market; OR*

(ii) *the arm's length price as defined in clause (ii) of section 92F, where the transfer of such goods or services is a specified domestic transaction referred to in section 92BA.*

Illustration depicting the transfer of goods and services between the eligible unit and any other business of the assessee.



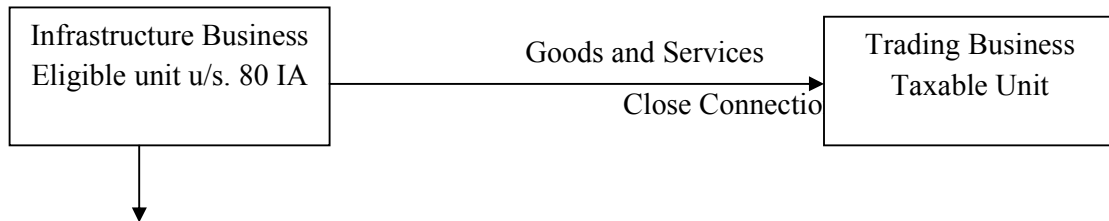
If the Transfer is at Rs. 10 crores and Market Value of above goods and services is Rs. 15 crores

The ALP of the above transaction is Rs. 15 crores.

VIII. **Any business transacted between the assessee and other person as referred to in sub-section (10) of section 80-IA**

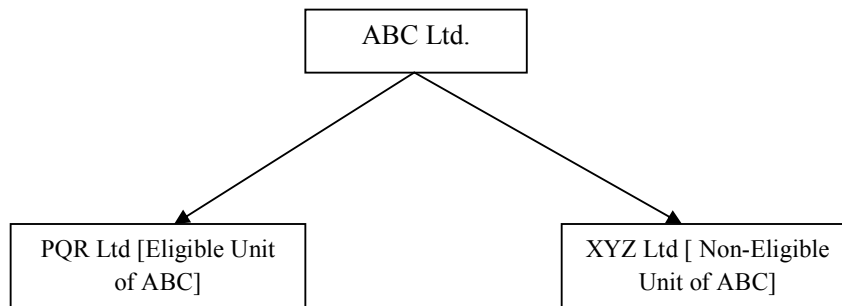
Section 80IA (10) of the Act states that ‘Where it appears to the Assessing Officer that, owing to the *close connection between the assessee carrying on the eligible business to which this section applies and any other person, or for any other reason*, the course of business between them is so arranged that the business transacted between them produces to the assessee more than the ordinary profits which might be expected to arise in such eligible business, the Assessing Officer shall, in computing the profits and gains of such eligible business for the purposes of the deduction under this section, take the amount of profits as may be reasonably deemed to have been derived therefrom.

¹³**Provided** that in case the aforesaid arrangement involves a specified domestic transaction referred to in section 92BA, the amount of profits from such transaction shall be determined having regard to arm's length price as defined in clause (ii) of section 92F'.



If the Operating Margin of the Eligible unit is 40% whereas the Industry Average is only 10%, then ALP will be taken as 10% only.

Illustration:



Interest free loan is given to the Eligible Unit of ABC and a higher interest of 17% is charged for the loan given to the non-eligible company. The transactions are covered by SDT and extra ordinary profits shall be disallowed and the excess of interest shall be computed in accordance with ALP.

Term ‘close connection’

The term ‘close connection’ is nowhere defined in Act. In general terms, it means the direct or indirect control in the management or capital of the company.

This could either be by:-

- (i) Holding substantial interest in the shares of one company by the other or
- (ii) The directors could be common for both the companies.

¹³ Inserted by Finance Act,2012 w.e.f.1-4-2013

Moreover, the provision includes the phrase ‘*any other reason*’ for the Assessing Officer to compute the profits and gains of such eligible business for the purposes of the deduction under this section, which is even more ambiguous. This widens the discretion of the assessing officer to invoke the provisions of this section.

IX. Any transaction, referred to in any other section under Chapter VI-A or section 10AA, to which provisions of sub-section (8) or sub-section(10) of section 80-IA are applicable; or

Section 10AA deals with the deductions for newly established units in Special Economic Zone(SEZ's)

According to sub-clause (4) of section 10 AA, this section is applicable to any undertaking or units fulfilling the following conditions:-

(i) *it has begun or begins to manufacture or produce articles or things or provide services during the previous year relevant to the assessment year commencing on or after the 1st day of April, 2006 in any Special Economic Zone;*

(ii) *it is not formed by the splitting up, or the reconstruction, of a business already in existence:*

***Provided** that this condition shall not apply in respect of any undertaking, being the Unit, which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such undertaking as is referred to in section 33B, in the circumstances and within the period specified in that section;*

(iii) *it is not formed by the transfer to a new business, of machinery or plant previously used for any purpose.*

Sub-clause (9) of section 10AA states that ‘The provisions of sub-section (8) and sub-section (10) of section 80-IA shall, so far as may be, apply in relation to the undertaking referred to in this section as they apply for the purposes of the undertaking referred to in section 80-IA’.

Thus, this brings the transactions of goods and services between an undertaking mentioned in section 10AA and a closely connected company or another non-eligible unit under the ambit of SDT. These transactions will be computed under the arm's length principle.

Illustration: XYZ Ltd. is a SEZ developer and it has a SEZ unit [Assessee] in Siruseri. The developer owns another trading unit [non-eligible unit]. The trading unit rents its building for administrative office purpose of the SEZ unit for a sum of Rs. 2 crores whereas the arm's length price is Rs. 20 crores. Thus, the profit of the assessee shall be computed based the transfer of Rs. 20 crores thereby reducing the profits of the SEZ unit.

X. **FAIR MARKET VALUE Vs. ARMS LENGTH PRICE:**

BASIS OF DISTINCTION	FMV	ALP
Definition	The price which the goods or services would fetch in the open market.	A price which is applied in a transaction in uncontrolled conditions.
Computation Mechanism	No specific mechanism provided in law.	Appropriate method out of the five methods which have been prescribed.
Transaction Value	Any market price point can be treated as FMV.	Arithmetic mean of comparable prices treated as ALP.
Sample size	One comparable is sufficient to determine FMV.	Require bigger sample size for determining ALP.
Deviation	No deviation permitted from FMV.	Plus or minus 5% deviation is allowed.

XI. **Industries which may be impacted by the incorporation of Specified Domestic Transactions into the abovementioned sections:**

- i. Infrastructure developers
- ii. Hotels and convention centers
- iii. Telecommunication service providers

- iv. Producers or distributors of power
- v. Construction and development of housing projects
- vi. Developers of Industrial park
- vii. Commercial producers of mineral oil/natural gas and refiners of mineral oil
- viii. Developers of SEZ under section 10AA
- ix. Taxpayers with income from SEZ units under section 10AA

XII. TRANSACTIONS WHICH ARE COVERED BY DOMESTIC TRANSFER PRICING:

- i. Transfer of goods and services between companies having substantial interest in one another.
- ii. Interest on loans given within the group of companies.
- iii. Inter-transfer of goods / services between eligible business / units and other businesses / units of the taxpayer in India
- iv. Rent payments within domestic related enterprises e.g., between SEZ Developer and SEZ units
- v. Payments made for remuneration or fees to the directors of associated company.
- vi. Transaction of Brand Equity Charges
- vii. Payments made for the use of common facilities like human resources, office facilities etc. between related enterprises.

XIII. THRESHOLD LIMIT:

The concerns of administrative and compliance burden are addressed by restricting its applicability to the transactions, which exceed a monetary threshold of Rs. 5 crores in aggregate during the year. The threshold limit of Rs. 5 Cr is required to be applied on aggregate basis by taking sum total of all transactions covered under all six limbs of s. 92BA and not with reference to each category of transactions. The threshold is required to be

examined on year-on-year basis. The threshold is required to be examined by adopting values as reported by taxpayer on the basis of entries in his books of account.

XIV. COMPLIANCES & PENALTIES:

Particulars	Compliance to be followed	Penalties
Filing of the Audit Report in Form 3CEB	Mandatory to file Form 3CEB before the due date of filing return of income if the value of SDT exceeds INR 5 crs or even if there is international transaction with Associated Enterprises of even a single Rupee	Rs 1,00,000 (Sec 271BA)
Reporting of each SDT and international transaction entered into with related party in Form 3CEB	Mandatory to report every transaction in form 3CEB	2% Of the value of each transaction (Sec 271AA)
Maintenance of transfer pricing Documentation	Mandatory to maintain documentation where transaction subject to transfer pricing exceed 1Cr.in a financial year for international transaction & INR 5 Cr for SDT	2% Of the value of each transaction (Sec 271AA)
Maintenance and furnishing of correct information/documents before AO and CIT(A)	Mandatory to maintain and furnish correct information/documents before AO and CIT(A)	2% Of the value of each transaction for False reporting (Sec 271AA)

Concealment of particulars of income and furnishing inaccurate particulars thereof	Mandatory to furnish correct particulars of transaction before the Revenue authorities	Penalty ranging from 100% to 300% of the amount of tax sought to be evaded if adjustment is made by the Revenue authorities (Expl.7 to Sec.271(1) (c))
Failure to furnish information or documents as required under section 92D(3)	Mandatory to furnish information or documentation required by the revenue authorities within timelines as per section 92(D)(3)	Penalty @ 2% of the value of the transaction for each such failure(Sec 271 G)

XV. **OVERVIEW OF PENALTIES:**

Penalty provisions of TP made applicable to SDT	New penalty provisions for TP & SDT w.e.f. 01.04.2013
2% of Transaction Value for: a) Non-maintenance of documents b) Non-submission of documents In case of adjustment 100% to 300% of additional tax	2% of Transaction Value for: a) Non-reporting of transaction b) For incorrect maintenance/submission of documents

XVI. **CURRENT & ADDITIONAL COMPLIANCE REQUIREMENTS FOR SDT:**

CURRENT COMPLIANCES	ADDITIONAL COMPLIANCES
<ul style="list-style-type: none"> • Section 40A – Transactions to be reported in Tax Audit Report in Form 3CD • Section 10AA – CA Certificate in Form 56F needs to be filed • Section 80IA – Declaration of profit to be made by CA in Form 10CCB 	<ul style="list-style-type: none"> • Maintain contemporaneous documentation as prescribed in Rule 10D and prove that transactions are at ALP by selecting MAM • Filing audit report in Form 3CEB/any other Form that may be prescribed

XVII. **SYNOPSIS OF DOCUMENTATION:**

Entity related	Price related	Transaction related	Supporting documents
<u>Profile of industry</u> <ul style="list-style-type: none"> • Profile of group • Profile of unit of the entity claiming tax holiday • Profile of related parties 	<u>Transaction terms</u> <ul style="list-style-type: none"> • Functional analysis (functions, assets and risks) • Economic analysis (method selection, comparable, benchmarking) • Forecasts, budgets 	<ul style="list-style-type: none"> • Agreements • Invoices • Pricing related correspondence (letters, emails etc) 	<ul style="list-style-type: none"> • Official publications, reports by Government, institutions of repute, Stock exchanges • Financial statements

XVIII. **MAINTENANCE OF INFORMATION AND DOCUMENTS (Sec 92D):**

As per section 92D, every person who has entered into Specified Domestic Transaction shall keep and maintain such information and documents in respect thereof, as prescribed in **RULE 10D.**

- a. Organizational Structure
- b. Nature of business
- c. Profile of companies with which assessee has specified domestic transaction
- d. Controlled transactions
- e. Background documents
- f. Comparability, functional and risk analysis
- g. Industry and market conditions forecasts/ budget, financial estimates
- h. Uncontrolled transactions and comparability analysis
- i. Selection of transfer pricing method
- j. Application of the transfer pricing method
- k. Assumptions, strategies, policies
- l. Supporting information

XIX. **NEED AND IMPORTANCE OF DOCUMENTATION:**

- a. Onus on the Assessee to prove the genuineness of the transaction.
- b. Information is gathered from databases such as Capitaline and Prowess and other public sources.
- c. Assessee has to find proper comparable to determine acceptable Arm's Length Price.
- d. Assessee has to substantiate the Value ascertained for the transaction.
- e. Non-substantiation leads to rejection by TPO

XX. **TRANSACTIONS AND REQUIRED DOCUMENTS:**

Purchase/sale of Raw Materials

- a. Purchase/ Sale order
- b. Invoices
- c. Product details
- d. Pricing strategy & negotiation
- e. Terms of payment
- f. Sales to 3rd parties
- g. Quotes from competitors

Reimbursement of expenses

- a. Nature of expenses with break-up
- b. Employee details
- c. Actual invoices
- d. Reason for expenses

Remuneration to Director

- a. Qualification
- b. Experience
- c. Profile
- d. Minutes of meetings
- e. HR data of other firms

Interest on Loan

- a. Loan agreement
- b. Interest Rate, basis of determination
- c. Rate card for period of loan
- d. Reason for higher or lower interest rate

Rent Paid

- a. Rental agreement
- b. Rent receipts
- c. Fair market value of the property (municipal valuation)
- d. Reliable sources of rent in surrounding area

Corporate Cost Sharing

- a. Nature of expenses
- b. Proof of services
- c. Cost benefit analysis
- d. Basis of allocation
- e. Auditor's certificate

XXI. **DOMESTIC TP – FILING OF FORM 3CEB:**

- a. All taxpayers to whom the provisions apply required to file a Form 3CEB certified by a Chartered Accountant (CA)
- b. For FY 2012-13, the due date of filing Form 3CEB is Nov 30, 2013
 - i. Requirement to file physical copy of the certified form
 - ii. No provision for filing electronic copy
- c. TP documentation forms the basis for certification of Form 3CEB
- d. Certificate contains details such as
 - i. Compliance by taxpayer with the TP documentation requirements
 - ii. Nature/Quantum of transactions and method used to determine ALP
- e. Aimed at assisting tax officers in assessment proceedings

XXII. **CONCLUSION:**

The very object of the introducing DTP in India is to curb down the instances of avoidance of tax by enterprises in domestic related transactions, as they tend to arrange the affairs between them in such a way as to reduce the tax liability. The meaning of Specified Domestic Transactions is given in section 92 B and the method of computation of arm's length price is as mentioned in section 92C of the Act. Specified Domestic Transactions covers all the transactions between related parties and will be reviewed when the threshold limit of Rs. 5 crores is crossed. Documentation is an essential part of SDT as the onus is on assessee to prove the genuineness of transactions and suitable comparables are chosen based on the documents available. There are no basis by which comparables can be selected unlike for international transactions where capitalonline and prowess are available. Further,DTP will increase the administrative cost of the government and whether the revenue yield will match the cost is to be seen. There will also be an increase in litigation which adds to the pending litigations. The real challenge of Domestic Transfer Pricing will be realized only when assessments are made to understand the manner in which assessing Officers are going to approach the DTP. Intricacies in the subject matter would be clarified only through judicial pronouncements.