

Understanding APA

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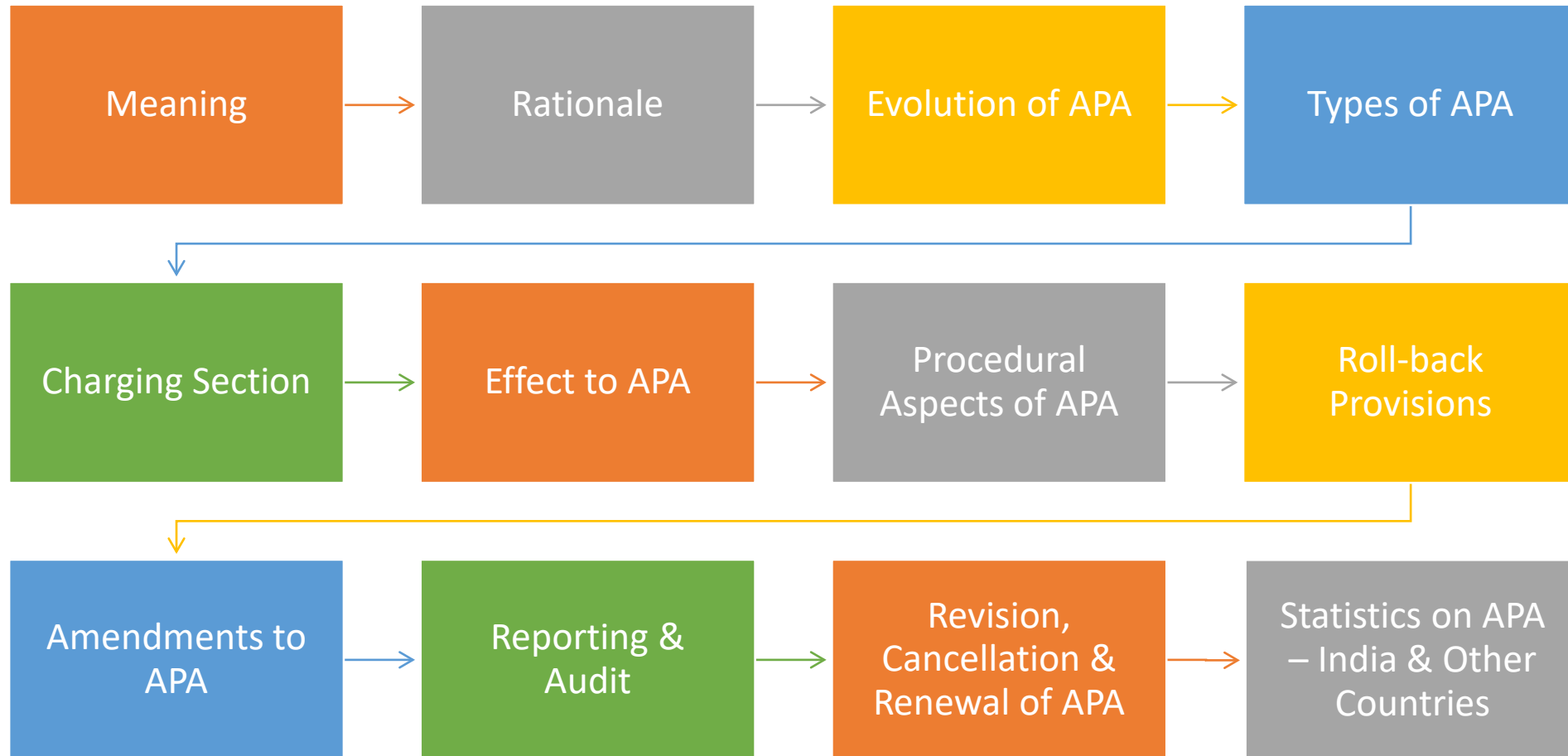
India-Singapore-London-Dubai-Malaysia-Africa

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Legends Used in the Presentation

ALP	Arms Length Price
APA	Advance Pricing Agreements
TP	Transfer Pricing
CBDT	Central Board of Direct Taxes
AE	Associated Enterprise
AO	Assessing Officer
TPO	Transfer Pricing Officer
CAI	Competent Authority of India
PFC	Pre - Filing Consultation
DGIT (IT)	Director General of Income Tax (International Taxation)
PPY	Preceding Previous Year
ITAT	Income Tax Appellate Tribunal
CG	Central Government
CIT	Commissioner of Income-tax
HC	High Court
UAPA	Unilateral APA
BAPA	Bilateral APA
MAPA	Multi-lateral APA

Presentation Schema



Meaning

APA – Advance Pricing Agreement



Between eligible assessee & income tax authorities

In determining ALP of proposed international transactions

Eligible assessee – assessee who has undertaken or is contemplating to undertake any international transaction - Rule 10G

Rationale

Reduces TP litigations

Certainty in tax assessment

Ease of doing business

Double taxation is avoided in BAPAs & MAPAs

Reduces compliance cost

Reduces burden of book keeping

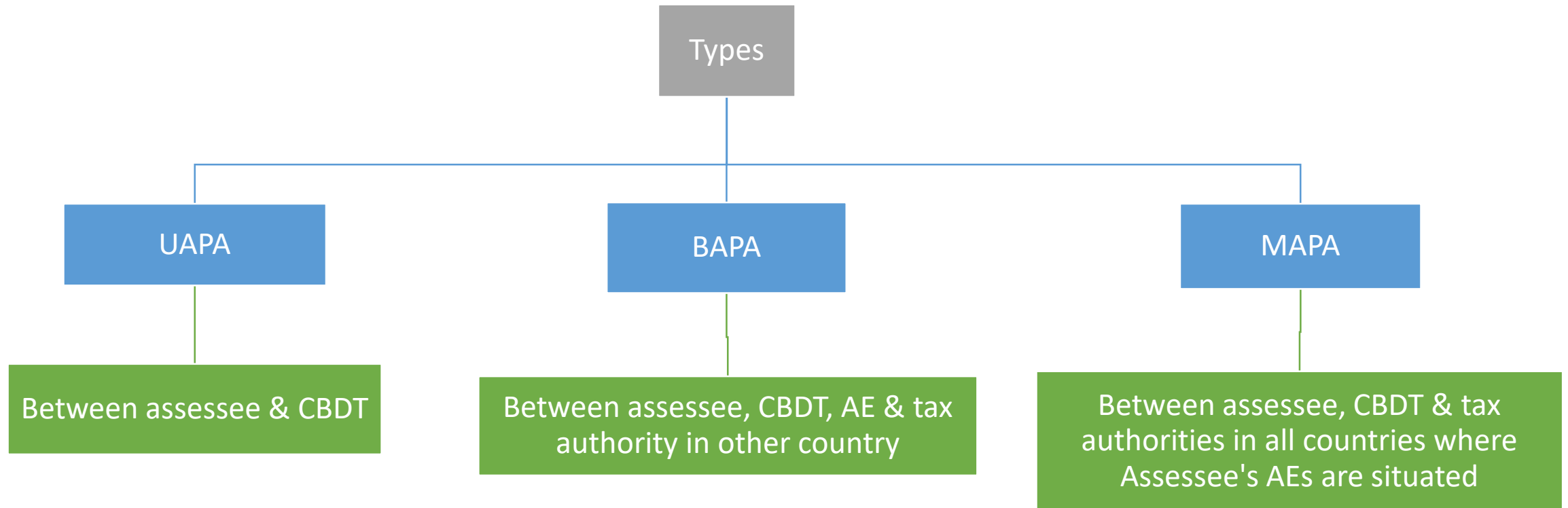
Evolution of APA

APA programme was launched in Finance Act, 2012 – Insertion of Sec 92CC & 92CD

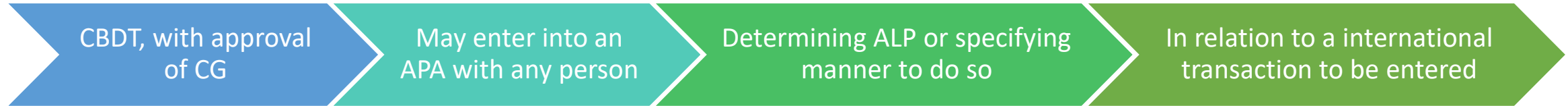
On 30th August 2012 CBDT notified the rules for APA - Rule 10F to Rule 10T

Roll-back provisions of APA were notified by CBDT on 10th July, 2014

Types of APA



Charging Provision – Sec 92CC



- Determination of ALP - any of the prescribed methods, with necessary adjustments or variations
- Once APA is entered into, provisions of Sec 92C and 92CA for determining ALP shall not apply

Validity

- APA is valid for maximum of 5 consecutive years and 4 preceding years if roll-back is sought for

Binding Effect

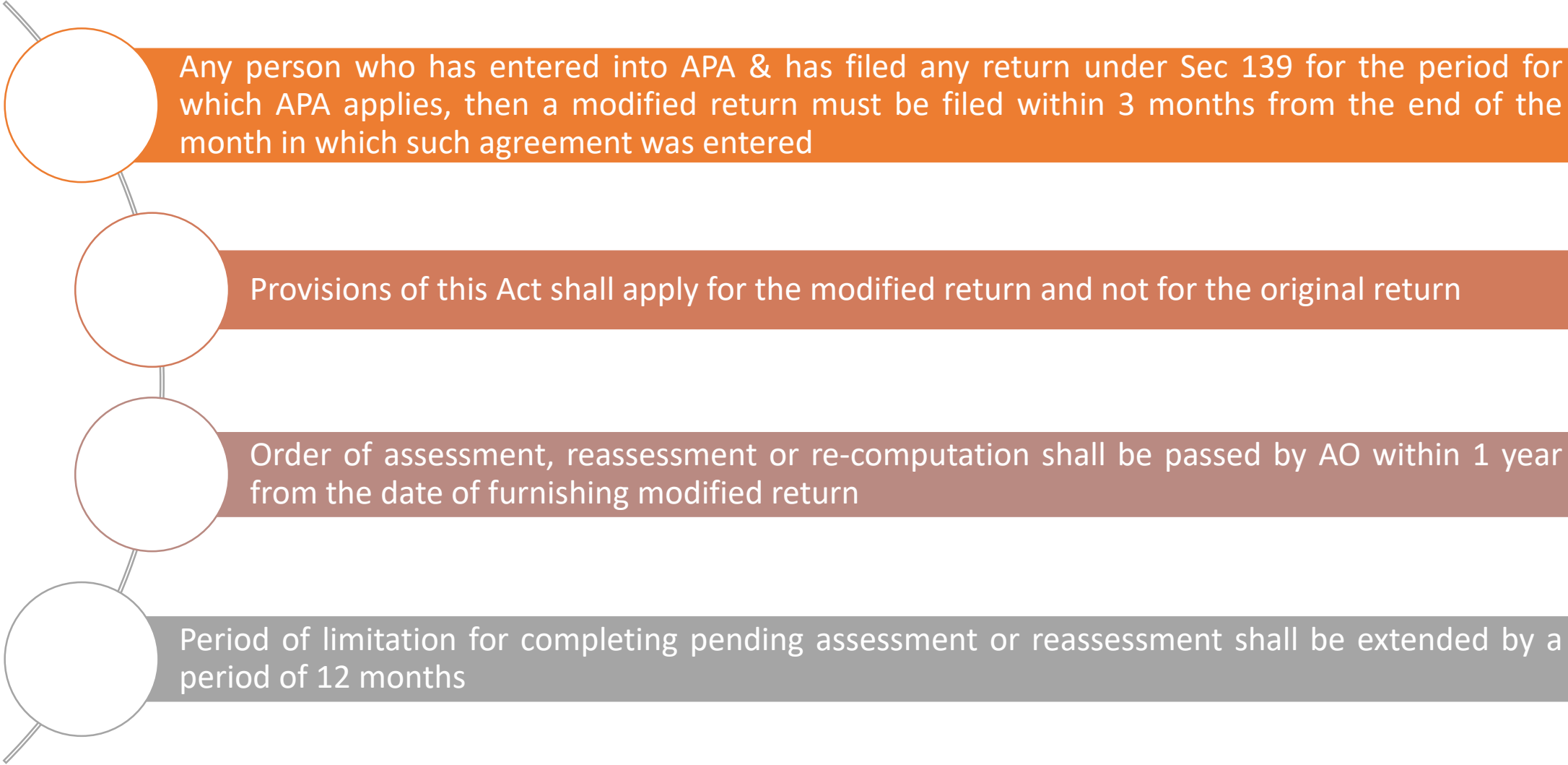
- APA is binding on
 - The person and the transaction for which APA is entered
 - The Principal Commissioner or Commissioner and the sub-ordinate income-tax authorities in respect of person and transaction
- In case there is bearing change in law or facts, APA loses its binding nature

Void ab initio

- APA can be declared as void in case it is entered into by fraud or misrepresentation of facts
- Once APA is declared as void, all the other provisions of the act shall apply as if no APA is entered
- For calculating any period of limitation, the period from date of entering APA and till the period which is declared as void shall be excluded. If the time limit after such exclusion is less than 60 days, it shall be extended to 60 days

All proceedings under the act shall be deemed to be pending when APA is applied

Effect to APA – Sec 92CD



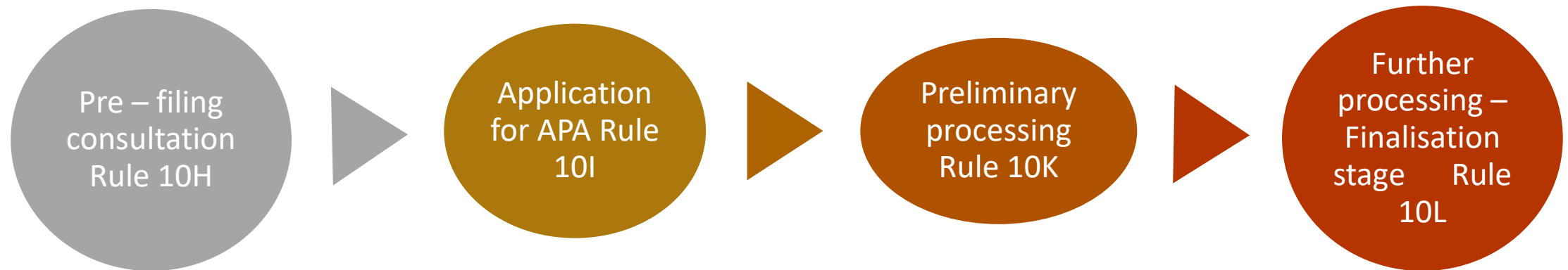
Any person who has entered into APA & has filed any return under Sec 139 for the period for which APA applies, then a modified return must be filed within 3 months from the end of the month in which such agreement was entered

Provisions of this Act shall apply for the modified return and not for the original return

Order of assessment, reassessment or re-computation shall be passed by AO within 1 year from the date of furnishing modified return

Period of limitation for completing pending assessment or reassessment shall be extended by a period of 12 months

Procedural Aspects of APA Application



Pre-filing Consultation (“PFC”) - Rule 10H

Eligible assessee can request for pre – filing consultation in Form No.3CEC

On receipt of Form 3CEC pre – filing consultation will be held with the assessee

Authorities - DGIT (IT) for UAPA
CAI for BAPA & MAPA

PFC shall not be binding on CBDT or the applicant and shall not mean that application has been made for APA

PFC will

- 1.Determine the scope of agreement
- 2.Identify TP issues
- 3.Determine the suitability of transactions
- 4.Discuss broad terms of the agreement

Application for APA – Rule 10I

Application for APA shall be filed in Form No.3CED along with prescribed fees

It must be filed with DGIT(IT) for UAPA & with CAI for BAPAs & MAPAs

Date of filing application – before the start of the previous year for recurring transactions or before undertaking the transaction for other transactions

Amount of international transaction	Prescribed fees (in ₹)
Below ₹100 crore	10 lakhs
Between ₹100 crore - ₹200 crore	15 lakhs
Above ₹200 crore	20 lakhs

Application for APA can be withdrawn at any time before finalisation of the agreement by applying in Form No.3CEE - fees paid shall not be refunded on withdrawal – Rule 10J

Preliminary Processing of Application – Rule 10K

DGIT(IT) or CAI shall issue deficiency letter within 1 month from receipt of Form No.3CED and enclosed requisite documents, if

Any defect is noticed in Form No.3CED or if relevant documents are not attached or if application is not in accordance with pre – filing consultation

Removing deficiency or modification must be made by the applicant within 15 days and time may be extended by further 15 days

If defect is not removed within the time specified then order shall be passed providing that application shall not be allowed to be proceeded and fees paid shall not be refunded

Order shall not be passed without providing an opportunity of being heard to the applicant

Further Processing – Rule 10L

If the application has been allowed to be proceeded, then authorities shall hold meetings with applicant, call for additional details/documents, visit business premises, make enquiries, etc.

Additional considerations for BAPAs & MAPAs – Rule 44GA

DGIT(IT) or CAI and applicant shall enter into a mutually agreed draft agreement after confirmations and acceptances

Final agreement shall be entered with CBDT after getting approval from CG

A copy of the agreement will be sent to the CIT having jurisdiction over the assessee.

Till the finalisation of agreement, provisions of TP shall continue to apply - Rule 10T

Additional Consideration – Rule 44GA

Process of APA shall not be initiated unless AEs initiates the process outside India with its authorities

CAI will ascertain willingness for negotiation with Competent Authorities in other countries and accordingly agree for terms which are acceptable by both the authorities (negotiation shall be as per tax treaties – Rule 10T)

In case of an agreement, CAI shall then arrange for a mutual agreement procedure with Competent Authorities in other countries

In case of failure of negotiation, the same will be communicated to the applicant

Applicant shall not be entitled to be a part of discussion between Competent Authorities

Applicant shall communicate its acceptance or otherwise within 30 days and as an option can also enter into APA without the benefits of mutual agreement procedures agreed above

Terms of the Agreement – Rule 10M

An APA, inter alia, includes

- the international transactions covered;
- the agreed TP methodology, if any;
- determination of ALP, if any;
- definition of any relevant terms to be used
- critical assumptions;
- roll-back provision
- specific conditions if any

Agreement shall not be binding
CBDT or the assessee

- if there is a change in any of critical assumptions or failure to meet conditions subject to which the APA has been entered

The binding effect of agreement shall cease

- only if any party has given due notice to the concerned other party(ies)

In case there is a change in any of the critical assumptions or failure to meet the conditions

- APA can be revised or cancelled

Notice in writing of change in any of the critical assumptions or failure to meet conditions

- Assessee to DGIT(IT) as soon as it is practicable to do so
- CBDT to assessee as soon as it comes to its knowledge

Roll-back of the Agreement-Rule 10MA

Roll-back provisions are introduced to determine ALP or the manner of determining ALP for the PPYs

- Roll-back provisions are applicable for 4 PPYs from the year of agreement
- International transaction should be the same as entered for year in which APA is applied for
- Return of income and report in Form 3CEB for the relevant roll-back year should be filed within the due date
- Applicant shall make request in Form 3CEDA for all relevant roll-back years with additional fee of Rs. 5 lakhs
- Roll-back provision shall not apply if

Determination of ALP is subject matter of appeal before Tribunal and it has passed an order disposing such appeal before signing APA

It results in reduction of total income or increase in loss as declared in the return of the applicant

Procedure for Effect to Roll-back – Rule 10RA

Modified Return for roll-back years

- Modified return needs to be filed along with proof of payment of additional tax
- It shall be furnished along with the modified return to be furnished for year in which in respect of first of the previous year for which the APA has been requested for.

Pending Appeals for a roll-back year

- Filed by applicant and pending before Commissioner (Appeals), ITAT or HC, the appeal to the extent of the subject covered under APA shall be withdrawn before furnishing the modified return
- Filed by AO or Principal Commissioner or Commissioner and pending before ITAT or HC - the appeal to the extent of the subject covered under APA shall be withdrawn within 3 months of filing of modified return
- The applicant, AO or the Principal Commissioner or the Commissioner, shall inform the Dispute Resolution Panel or the Commissioner (Appeals) or ITAT or HC, about the APA containing roll-back provision have been entered into

Failure to give effect

- If on account of failure on the part of applicant, the agreement shall be cancelled

Amendments to Application – Rule 10N

Amendments to Application

- Can be made at any time before finalisation of the agreement
- Request must be made in writing by the applicant
- Amendments will be allowed by DGIT(IT) or CAI only if it does not change the nature of the application
- Additional fees will be incurred if the value of transaction increases

Annual Compliance Report – Rule 10-O

Furnishing of Annual
Compliance Report

- Annual Compliance Report must be furnished in Form No.3CEF to DGIT(IT) for each year covered in the APA
- It must be furnished in quadruplicate for each year - Within 30 days from the due date of filing income tax return or within 90 days of entering into the agreement whichever is later
- DGIT(IT) will send one copy of report to the CAI, one copy to the CIT & TPO having jurisdiction over the assessee

Compliance Audit – Rule 10P

Compliance Audit

TP officer having jurisdiction over the assessee shall conduct compliance audit for each year, requiring assessee to substantiate that terms of APA has been complied with

Compliance audit report will be submitted by TPO to DGIT(IT) or CAI as the case may be within 6 months from the end of the month in which Annual Compliance report is received by TP officer, mentioning his findings relating to compliance

DGIT(IT) will send the report to CBDT where cancellation of agreement is required because of failure to comply on part of the assessee

Revision of APA – Rule 10Q

Revision of Agreement

APA can be revised if there is change in important factors and assumptions based on which APA was entered, change in law, request from foreign authorities in case of BAPA & MAPA

APA can be revised voluntarily by CBDT or on request made by assessee or DGIT(IT) or CAI.

However, CBDT can reject assessee's plea giving reasons for rejection

Opportunity of being heard shall be given to assessee if it has not requested for revision.

If assessee is not agreeing with the revision, he may opt for cancellation

Procedure mentioned in Rule 10L shall be followed to arrive at agreement for proposed revision

Revised agreement shall include date till which the original agreement will apply & date from which the revised agreement will apply

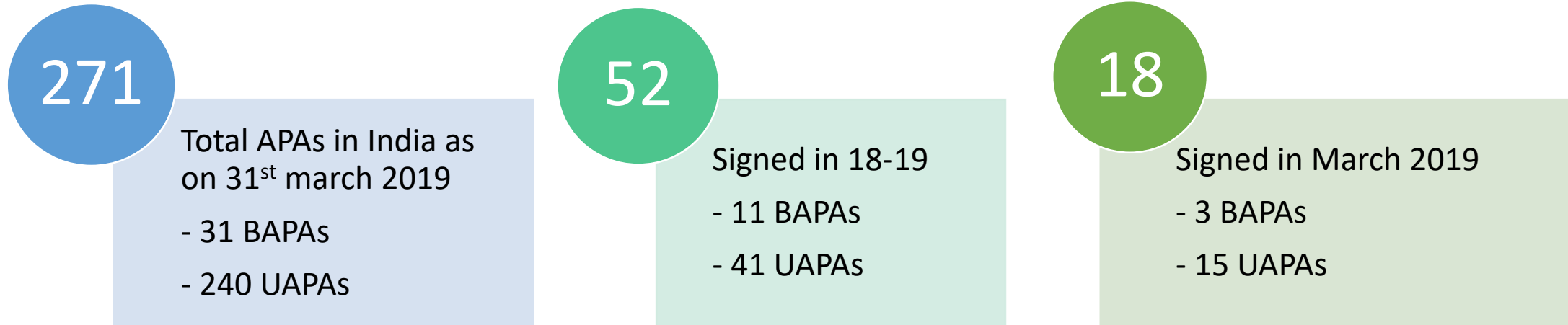
Renewal and Cancellation of APA – Rule 10R & Rule 10S

Cancellation of APA Rule 10R

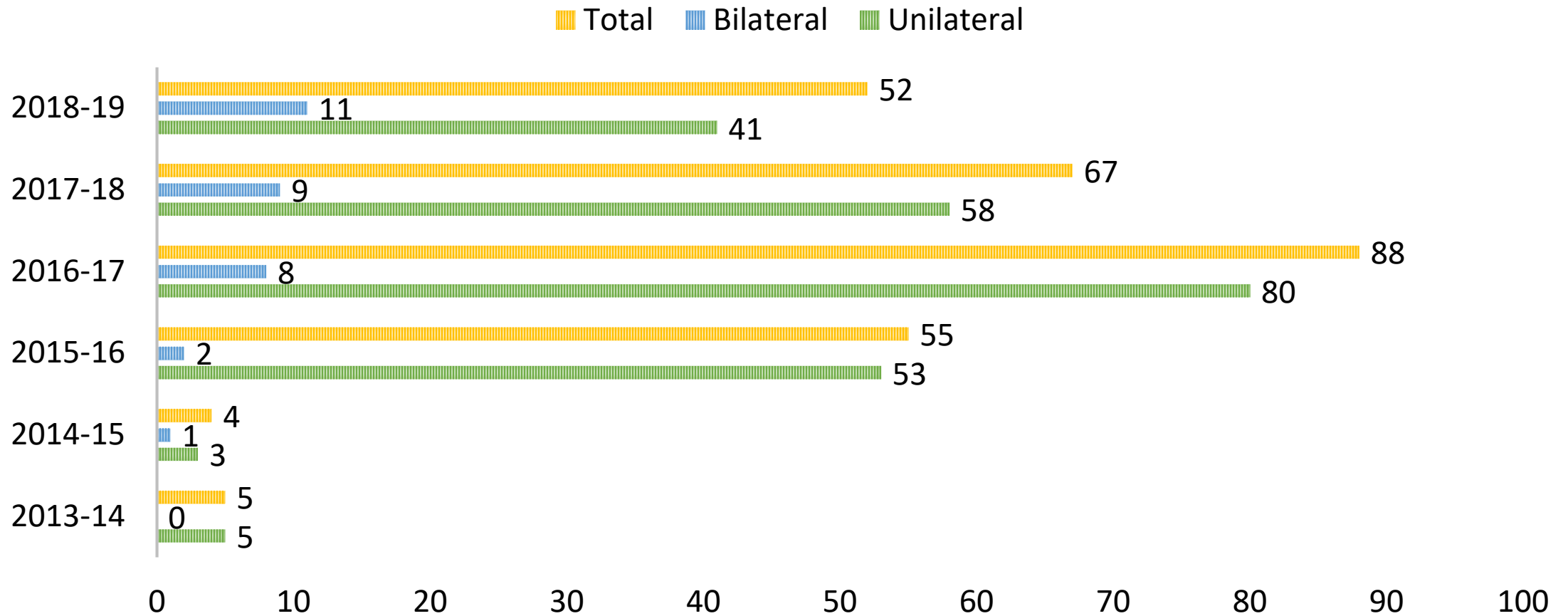
- An agreement shall be cancelled by CBDT if
 - 1. Report under Compliance Audit resulted in failure on the part of the assessee
 - 2. Failure to furnish Annual Compliance Report
 - 3. Filed report contains material errors
 - 4. Agreement is being cancelled on account of revision or giving effect to roll-back provisions
- Before cancellation, opportunity of being heard will be given to the assessee
- Order of cancellation will be in writing and reasons for cancellation & effective date of cancellation will be mentioned
- The order of cancellation shall be informed to the Competent Authorities in other countries with reasons, to the AO & TPO having jurisdiction over the assessee

Renewal of Agreement is to be made as a new agreement following the same procedures except pre-filing consultation - Rule 10S

Statistics on APA - India

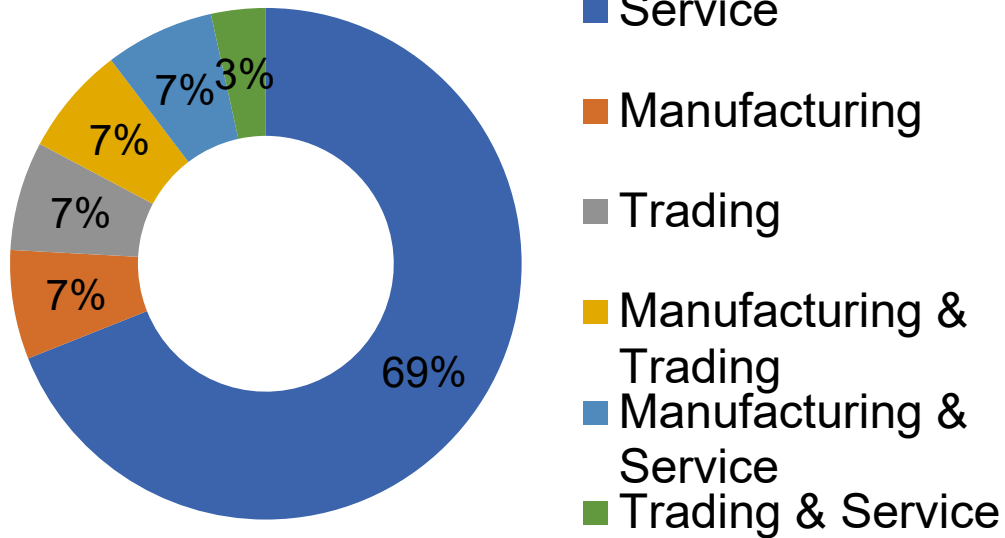


APAs Signed Year-wise

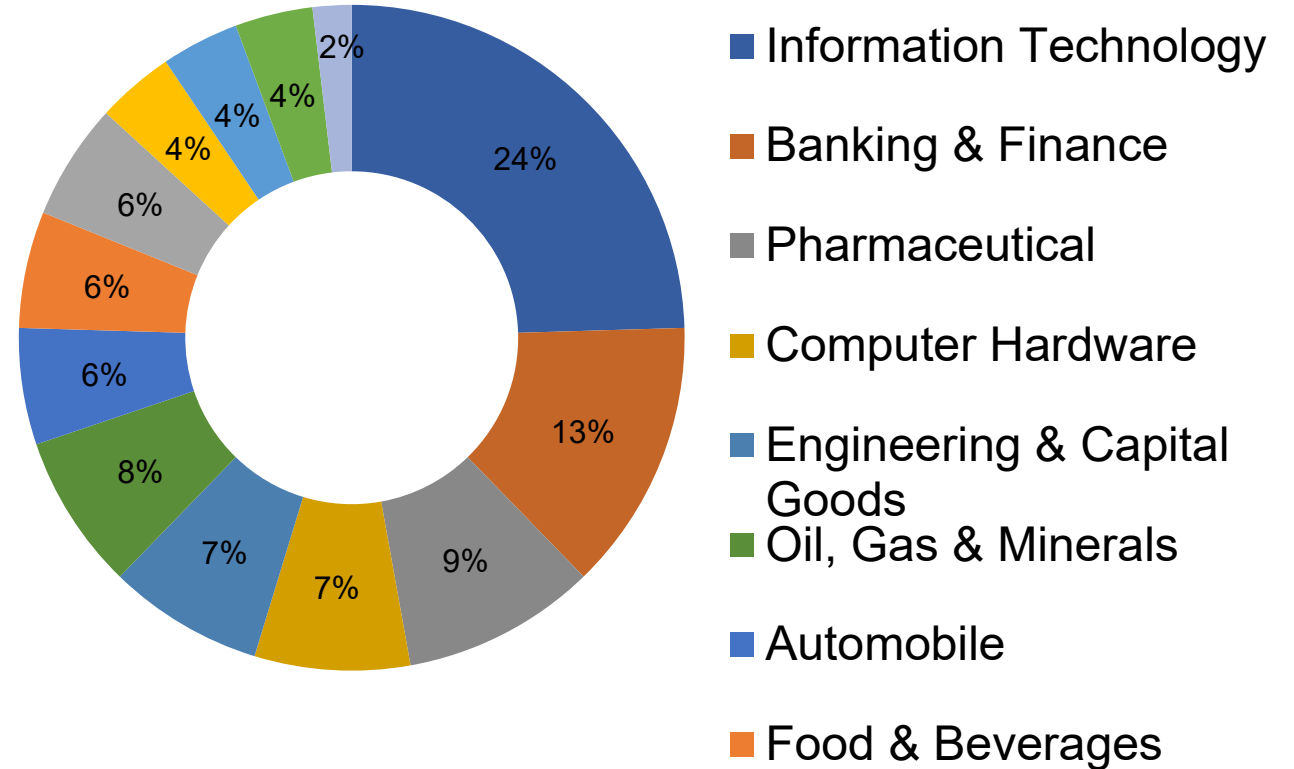


Unilateral APAs

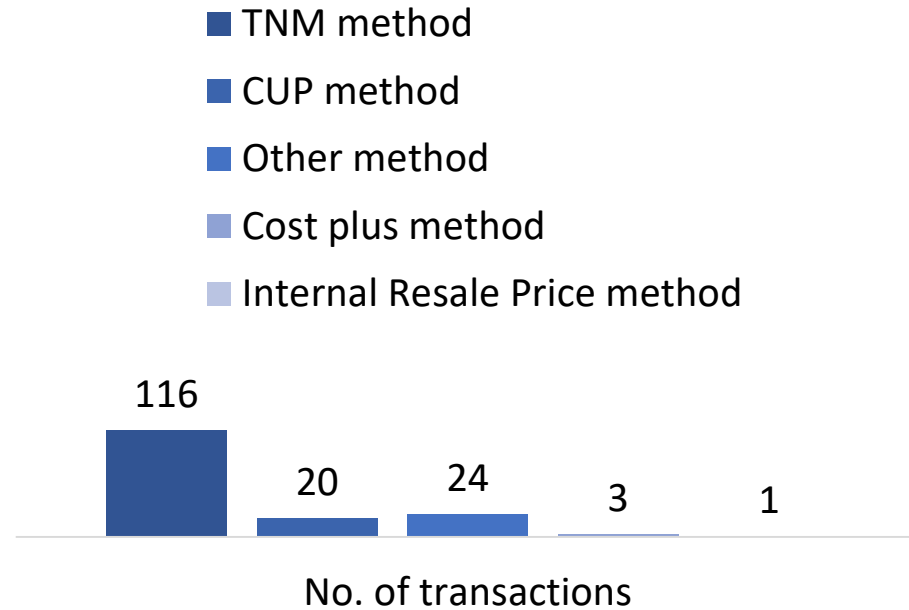
No. of UAPAs signed in 17-18 Economic Activity-wise



No. of UAPAs signed in 17-18 Industry-wise



Transfer Pricing Methodology Adopted in UAPAs (2017-18)



31.75 months

Average duration of processing

UAPAs as at 31st march 2018

- 38.62 months for 17-18

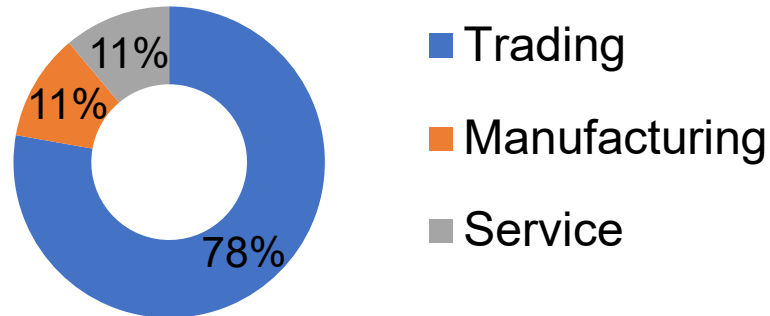
- 29 months as at 31st march 2017

A total of 164 international transactions have been covered under the 58 UAPAs entered into in F.Y 2017-18.

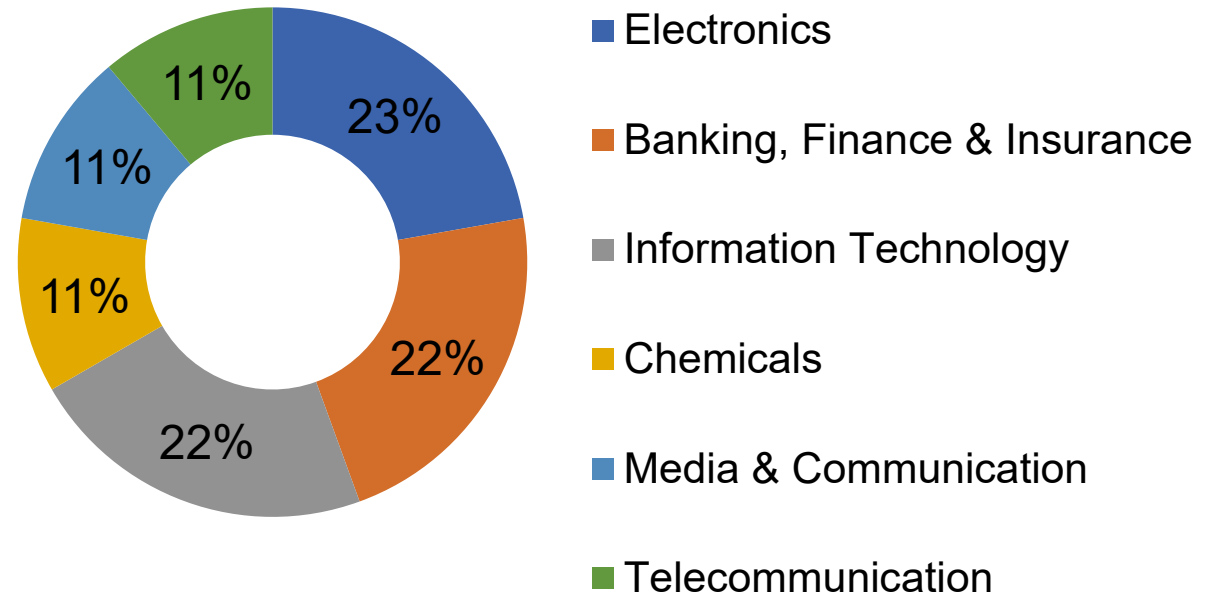
- Provision of IT enabled Services (ITeS) and Software Development (SWD) Services feature predominantly in the APAs entered into covering 29 and 23 transactions respectively.

Bilateral APAs

**No. of BAPAs signed in 17-18
Economic Activity-wise**

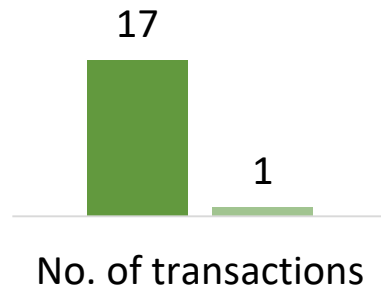


**No. of BAPAs signed in 17-18
Industry-wise**



Transfer Pricing Methodology Adopted in BAPAs (2017-18)

■ TNM method ■ CUP method



42.10
months

Average duration of processing
BAPAs as at 31st march 2018

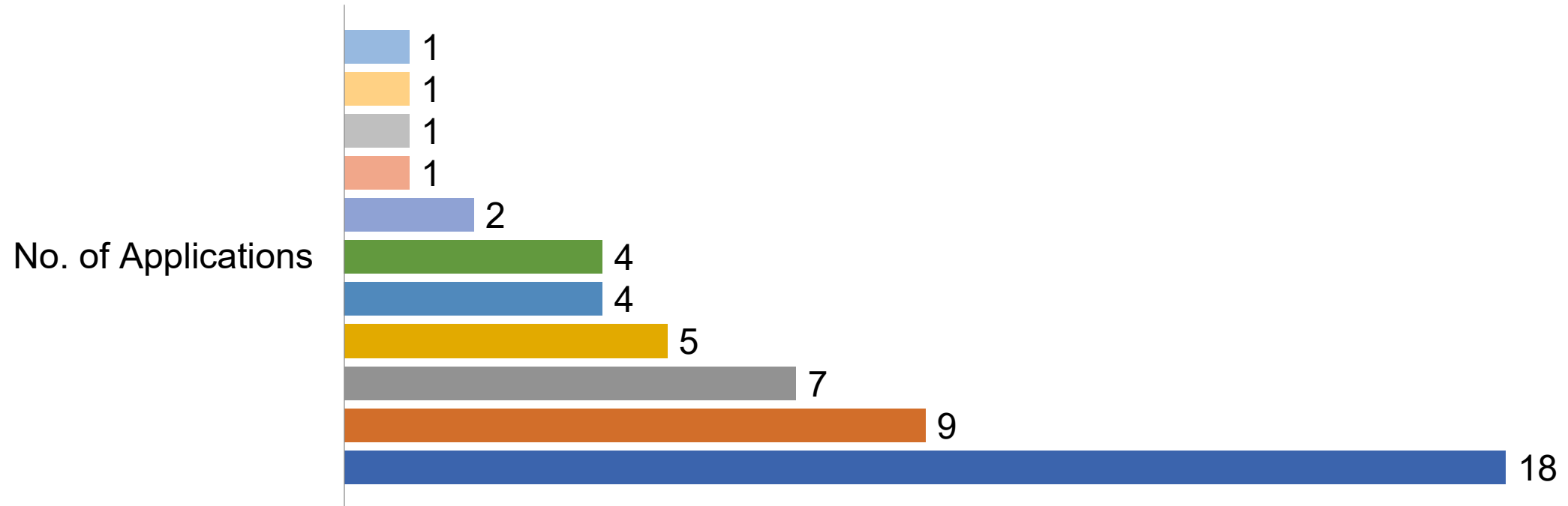
- 45.78 months for 17-18

- 39.09 months as at 31st march
2017

A total of 18 international transactions have been covered under the 9 BAPAs entered into in F.Y 2017-18.

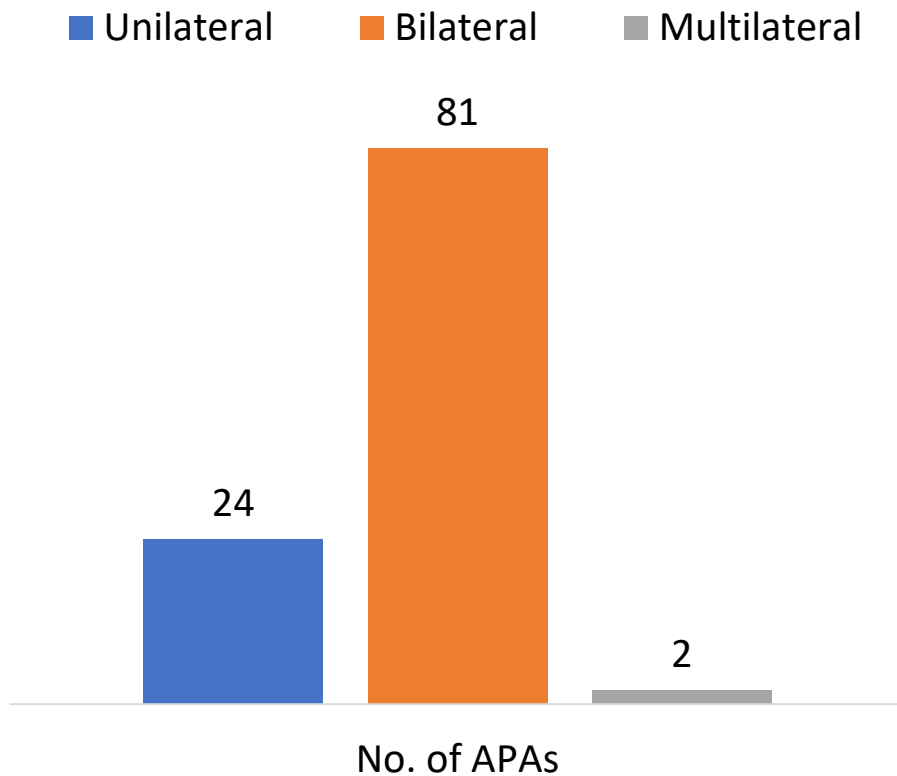
- Provision of ITeS and SWD Services feature predominantly in the BAPAs entered into covering 4 transactions each.

Country-wise Distribution of BAPA applications (2017-18)

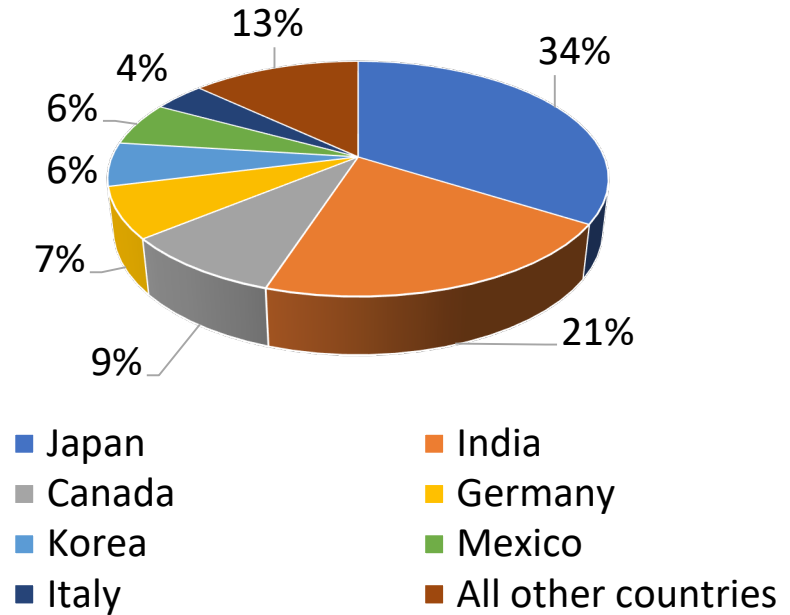


Statistics on APA - USA

Executed in 2018



BAPAs filed with countries 2018

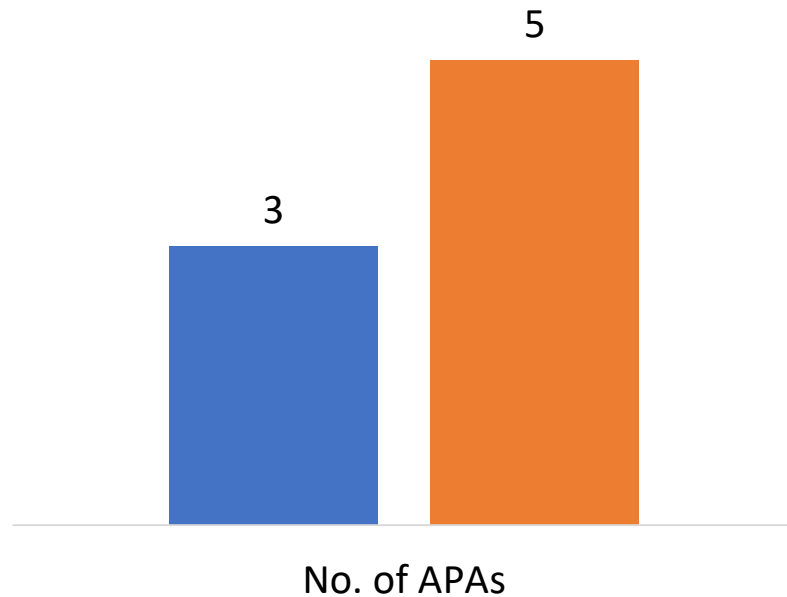


Duration of processing – Average (UAPAs & BAPAs) in 2018 is 42.8 months

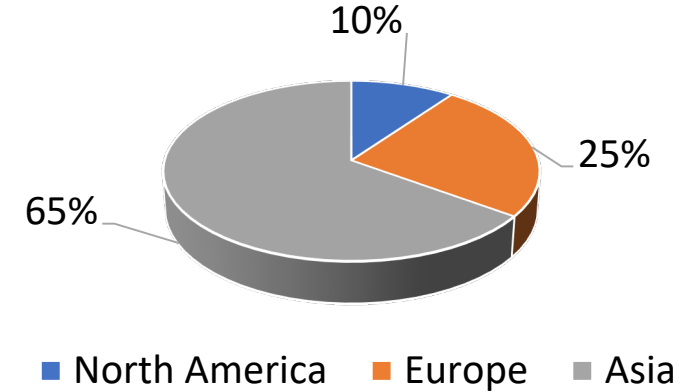
Statistics on APA - China

Signed in 2017

■ Unilateral ■ Bilateral



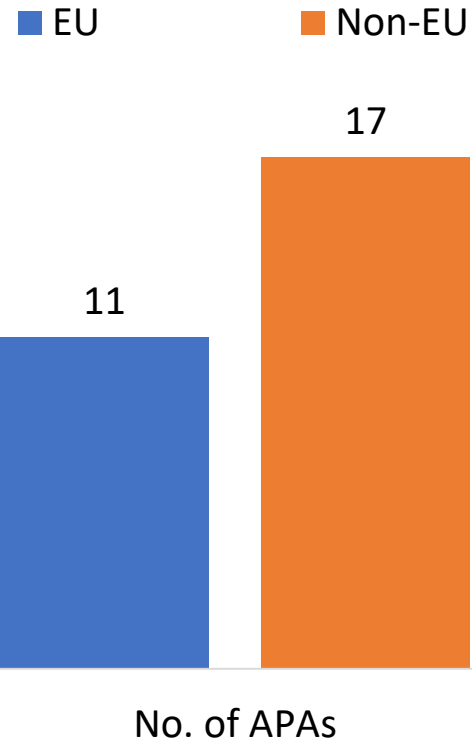
BAPAs by China



Duration of processing (till 2017)	% of cases	
	UAPAs	BAPAs
Within 1 year	56.3	50
1 to 2 years	37.9	15
More than 2 years	5.8	35

Statistics on APA - Germany

Executed in 2017

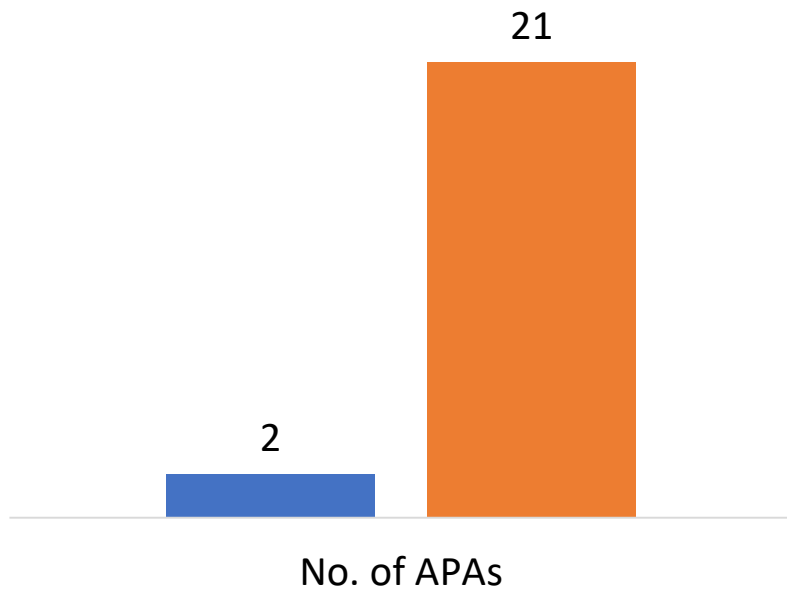


Duration of processing (in months)		
Type	2017	Overall Average (till 2017)
EU	36	38
Non-EU	47	51

Statistics on APA - UK

Executed in 2017

■ EU ■ Non-EU



Duration of processing (in months)	
Type	Overall Average (till 2017)
EU	53
Non-EU	35

Statistics on APA - Singapore

APAs (Reconciliation for 2017)	
Balance brought forward	41
Received	17
Completed	10
Withdrawn / Rejected	6
Balance at the end of 2017	42

Duration of processing (APAs completed in 2017)	Number of cases
Within 1 year	2
1 to 2 years	4
More than 2 years	4

Credits and Acknowledgments

Jugal Gala

DVS Research Team

Thank You

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