

India transfer pricing
dispute resolution:
The way forward

Agenda

- UK/India MAP and APA case statistics
- India transfer pricing landscape
- Case study 1 – Cost-plus markup
- Case study 2 – Management charges
- Case study 3 – Variable royalty rate
- Takeaways
- Questions and answers

UK/India MAP and APA case statistics



Key Statistics:

- India MAP cases accounted for approximately 15% (43/304) of the HMRC transfer pricing MAP inventory (post Jan 2016 cases) *
- India MAP cases accounted for approximately 5% (12/283) of the HMRC non-transfer pricing MAP inventory (post Jan 2016 cases) *
- UK bilateral APAs accounted for about 30% of the CBDT executed APAs and 15% of the pending APAs #

* Source: OECD Mutual Agreement Procedure Statistics per jurisdiction released in November 2021 covering status upto December 2020

2019 Indian CBDT APA Annual Report



Polling question 1



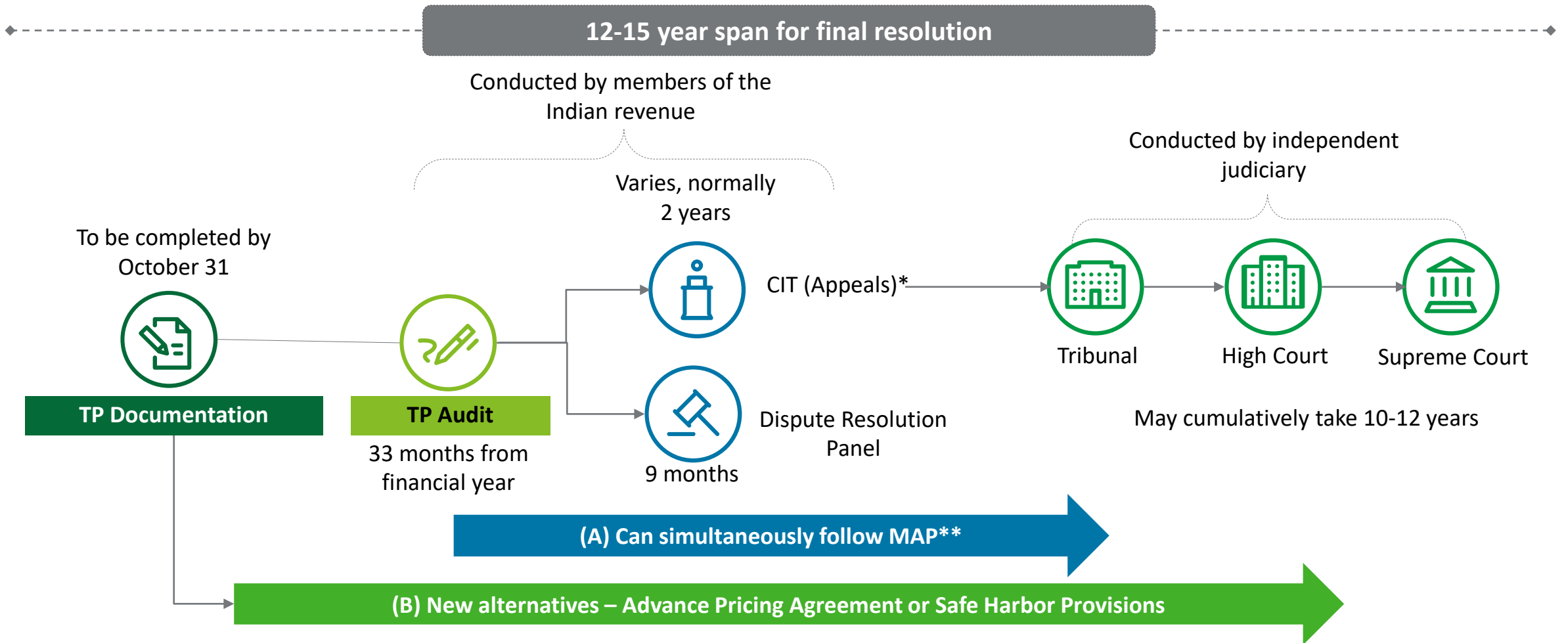
Have you considered applying for a bilateral APA with India?

- Yes, we have already applied
- Yes, we are considering applying
- No, not decided yet
- Not filing one



India: Litigation landscape

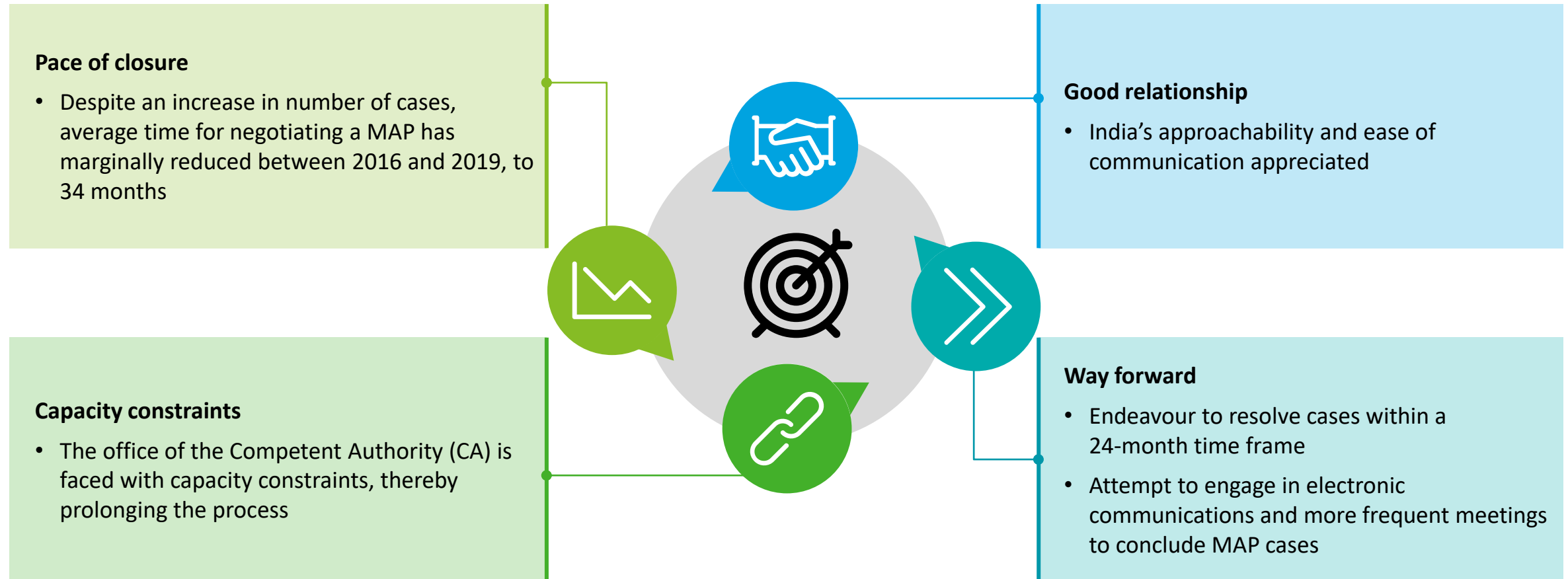
Time frame and new alternatives



* CIT (Appeals) – Commission of Income-tax (Appeals)

** MAP – Mutual Agreement Procedure

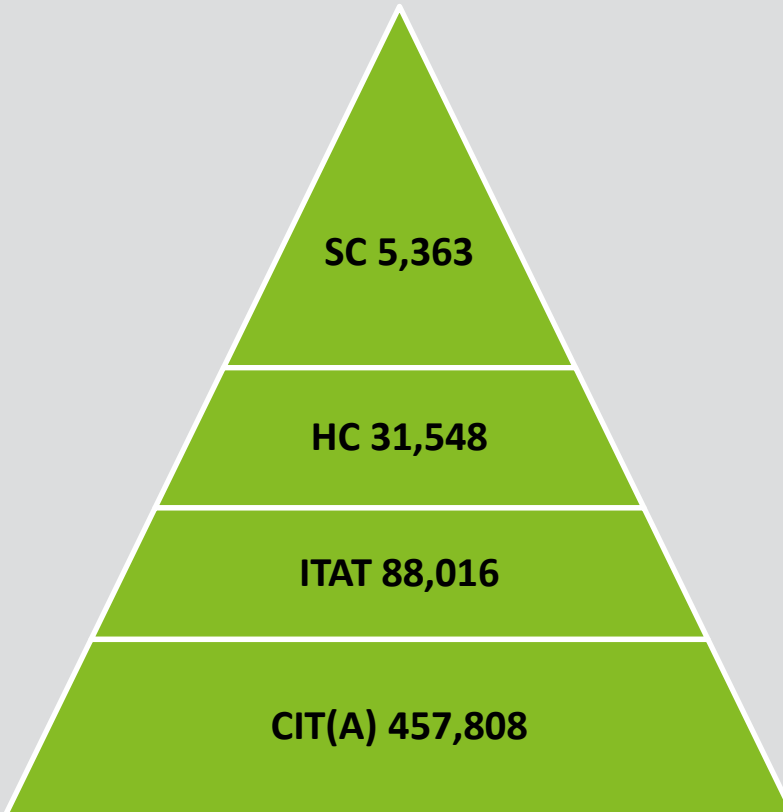
OECD MAP Peer Review Report, India



Source: OECD, Making Dispute Resolution More Effective – MAP Peer Review Report, India (Stage 2): Inclusive Framework on BEPS: Action 14, OECD/G20 Base Erosion and Profit Shifting Project (Paris: OECD Publishing, 2021). <https://doi.org/10.1787/cc6e7579-en>

India-UK APA and MAP: Key trends and statistics

Number of direct tax cases pending in appeals at various level of judiciary



01

APA filings:

- About 1,495 APA applications have been received upto March 2022
- Around 40% of the bilateral APA applications are with the US, **23% with UK**, 11% with Japan, and 6% with Switzerland #

02

APA conclusions:

- 421 APAs concluded until March 2022 – 361 unilateral and 60 bilateral APAs
- Out of which majority of the bilateral i.e., more than **30% were concluded with the UK** until March 2019 #
- More than 95 unilateral APAs were concluded for UK headquartered companies #

03

MAP resolution:

- More than 790 MAP cases resolved from April 2014 to December 2020 *
- India has resolved most of its MAP cases with UK, US, and Japan

04

Key transactions covered under APAs/MAPs:

- Provision of services by Indian captive entities
- Intragroup service charges
- Royalty payments
- Financial transactions

2019 Indian CBDT APA Annual Report . Country-wise bifurcation of bilateral application are not available after 2019

* Annual Report 2020-21, issued by Ministry of Finance, Government of India

HMRC: Transfer Pricing and Diverted Profits Tax statistics (1/2)

HMRC have released their annual transfer pricing statistics for 2020/21. These include data on TP & Diverted Profit Tax (“DPT”) enquiries/ Profit Diversion Compliance Facility (“PDCF”), Advance Pricing Agreements (“APA”), Mutual Agreement Procedure (“MAP”) and Advanced Thin Cap Agreements (“ATCA”).



The overall compliance activity and yield has been increased as compared to previous years. There is significant ongoing activity – over 100 cases on hand and over 400 Inspectors engaged in these areas.

Yield from TP enquiries including DP issues was more than £2 billion; the average enquiry now takes three years to conclude. Direct DPT yield has increased more than tenfold.



The registrations for the PDCF have dropped back as a result HMRC is investigating those registrants where their final proposals were rejected, and most multinationals that received PDCF letters and chose not to register.

The average length of time taken to conclude an APA has increased significantly to approximately 55 months. This is due to a small number of difficult cases distorting the average time. The same is true about the increase in average time to settle MAPs. Key message is that most double taxation is resolved, eventually



The number of ATCAs continues to decline as clients move more to dealing with thin-cap issues on enquiry rather than upfront. HMRC are also more reluctant to engage in a unilateral procedure where there is a working Treaty relationship with the county of the lender. The same principle applies for mainstream transfer pricing unilaterals.

HMRC: Transfer Pricing and Diverted Profits Tax statistics (2/2)

Relevant numbers in relation to alternate dispute resolution are tabulated below-

Particulars	2021/20	2020/19	2019/18
TP Yield*(£m)	2,162	1,454	1,169
Average age of settled TP enquiries (months)	36	31.4	33.1
APAs agreed during year	24	26	30
Average time to reach an APA agreement (months)	55.5	47.9	33.6
ATCAs agreed during year	23	45	59
Average time to reach an ATCA agreement (months)	28.1	24.4	26.3
MAP cases resolved during year	62	72	95
Average time to resolve MAP case (months)	34.4	22.86	27
DPT Yield (£m)	151	17	12
PDCF registrations	17	53	21

*The transfer pricing yield figures include additional tax revenue from enquiries (including real time interventions), Advance Pricing Agreements (APAs), Advance Thin Capitalisation Agreements (ATCAs) and transfer pricing Mutual Agreement Procedure (MAP) cases

Source: <https://www.gov.uk/government/publications/transfer-pricing-and-diverted-profits-tax-statistics-2020-to-2021/transfer-pricing-and-diverted-profits-tax-statistics-2020-to-2021>.

Polling question 2

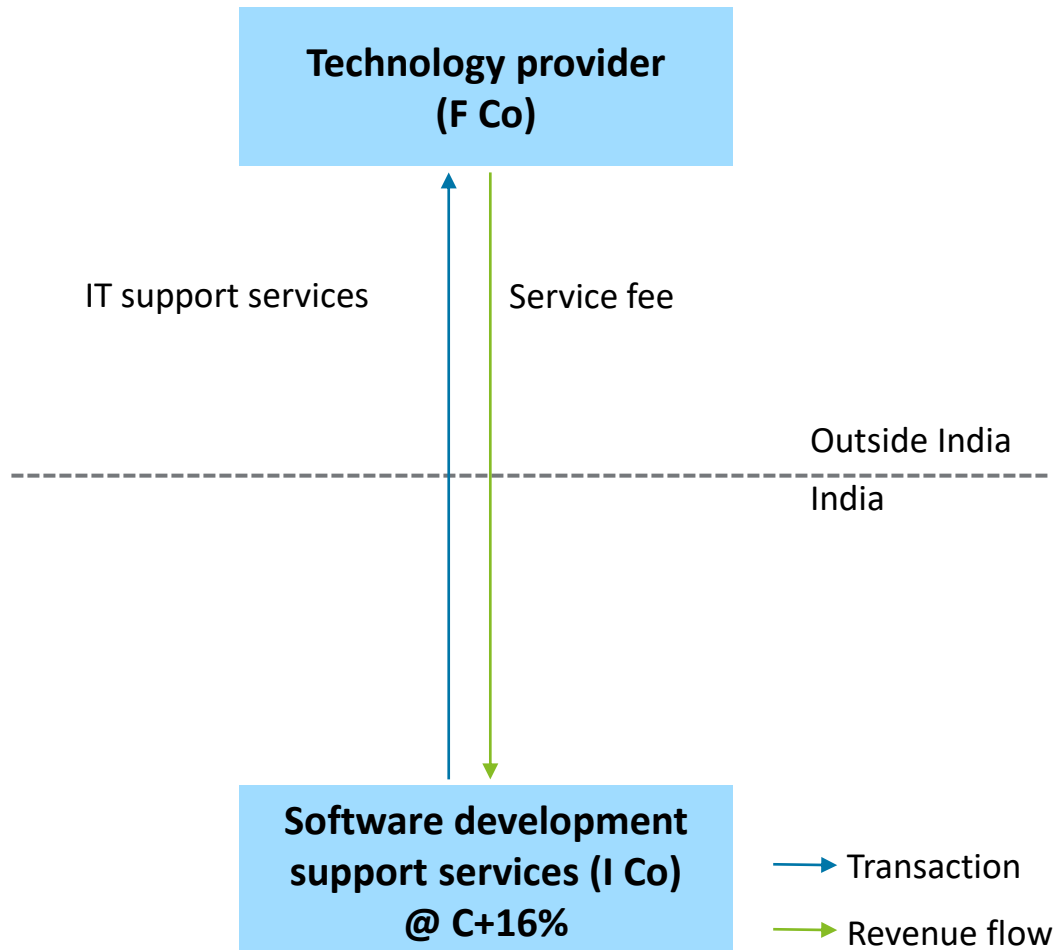


What intercompany transaction type with your Indian affiliate is of highest concern to you?

- Intra-group service charges
- Financial transactions
- Provision of services on cost-plus basis (e.g., IT, accounting, R&D, marketing)
- Royalty and other IP-related payments
- Others (e.g., advertising, marketing, and promotion [AMP] expenses/ intercompany purchases, sales)



Case study 1 – Cost-plus markup



Fact pattern

- For FYE March 2018, audit cycle completed, where field officer alleged C+25% as arm's-length price (ALP); case not picked up in immediate next year
- Field officer held forex loss to be considered non-operative in nature
- Field officer applied a markup on free-of-cost items, including:
 - Access to software provided to I Co by F Co
 - ESOPs granted by F Co to employees of I Co
- Notional interest lost on delayed receipt of revenue (received in 90 days from date of invoice; invoice raised quarterly)
- I Co is evaluating whether to apply for a unilateral APA/bilateral APA, with a rollback, or a MAP

Case study 1 - Issues for discussion



Issues for discussion

- Mark-up on the pass-through costs
- Implications of tribunal orders on MAP and rollback
- Expanding the cost base by including free-of-cost items
- Bilateral APA vs. unilateral APA
- Issues around “carry” for non-binding investment advisory companies



Polling question 3

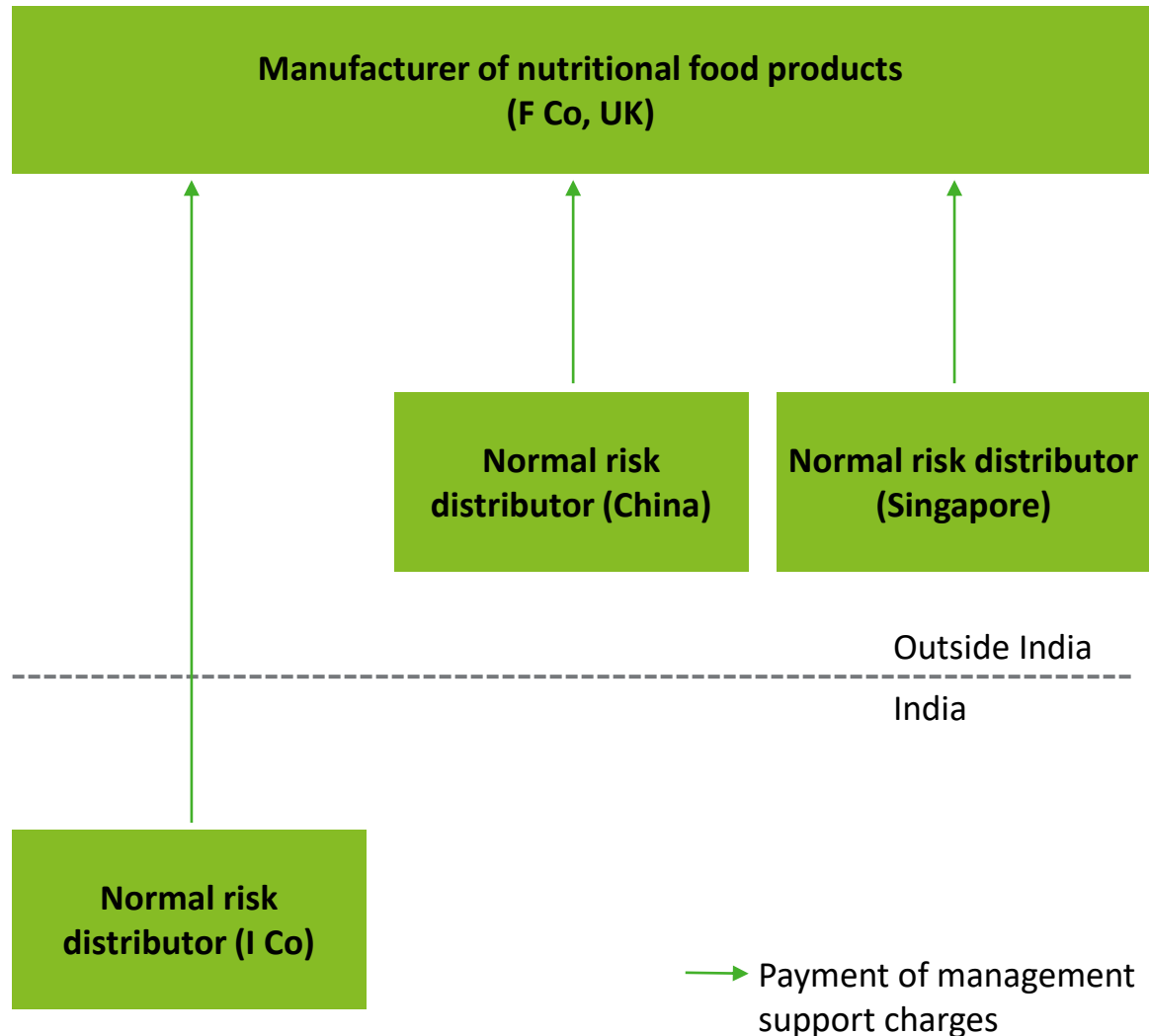


Where your company has operations in India, how do you foresee their capabilities in the next five years?

- Stable
- Small increase in capabilities
- Large increase in capabilities
- Decrease in capabilities
- Don't know/not applicable



Case study 2 - Management charges



Fact pattern

- F Co houses a service hub, offering support services to the group in accounting, auditing, IT support, HR, and legal services
- The intent is to promote consistency in the group and efficiency of costs
- A detailed mechanism of allocation of costs has been identified and pre-fed into the technology platform used in-house, based on allocation keys identified
- Field officer in India disallows over 80% of the management costs paid by I Co year on year, citing lack of documentary evidence and disparity in need-benefit-costs
- Such disallowance results in considerable double taxation for the group

Case study 2 - Issues for discussion

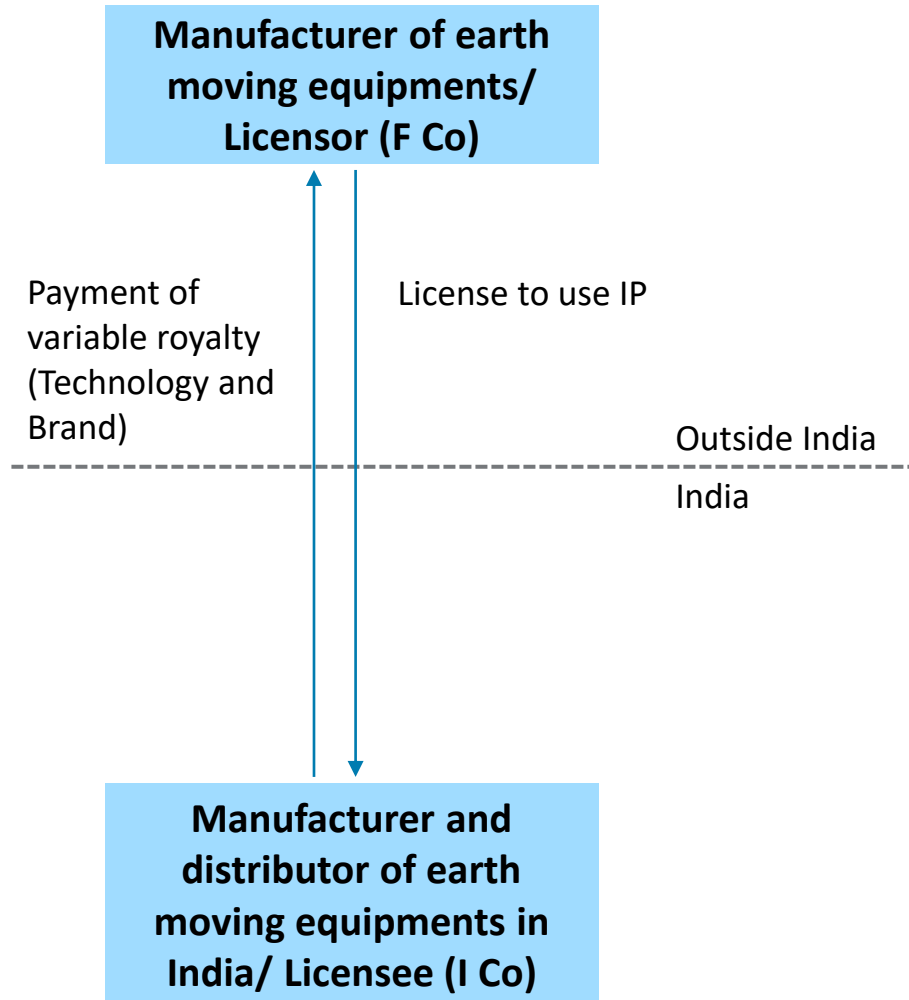


Issues for discussion

- Current experience under APA and MAP on this issue
- Payment in nature of Fees for Technical Services and treatment in non-resident entity
- If a lower payment is agreed for closed APA years, are there implications for withholding deposited?



Case study 3 - Variable royalty rate



Fact pattern

- F Co licenses I Co the right to use its technology and brand in the Indian market
- Intercompany arrangement between F Co and I Co provides for variable royalty on sales of I Co in Indian market, ranging from 0.5% to 6%
- Owing to windfall profitability, effective royalty rate paid by I Co arrived at 6%
- The field officer suggested that, based on economic analysis, the arm's-length royalty rate in the earth-moving/ construction sector fell in the range of 2% to 3% of sales, and proposed to disallow any incremental royalty paid
- I Co contends that it has provided economic analysis that supports its terms of variable royalty

Case study 3 - Issues for discussion

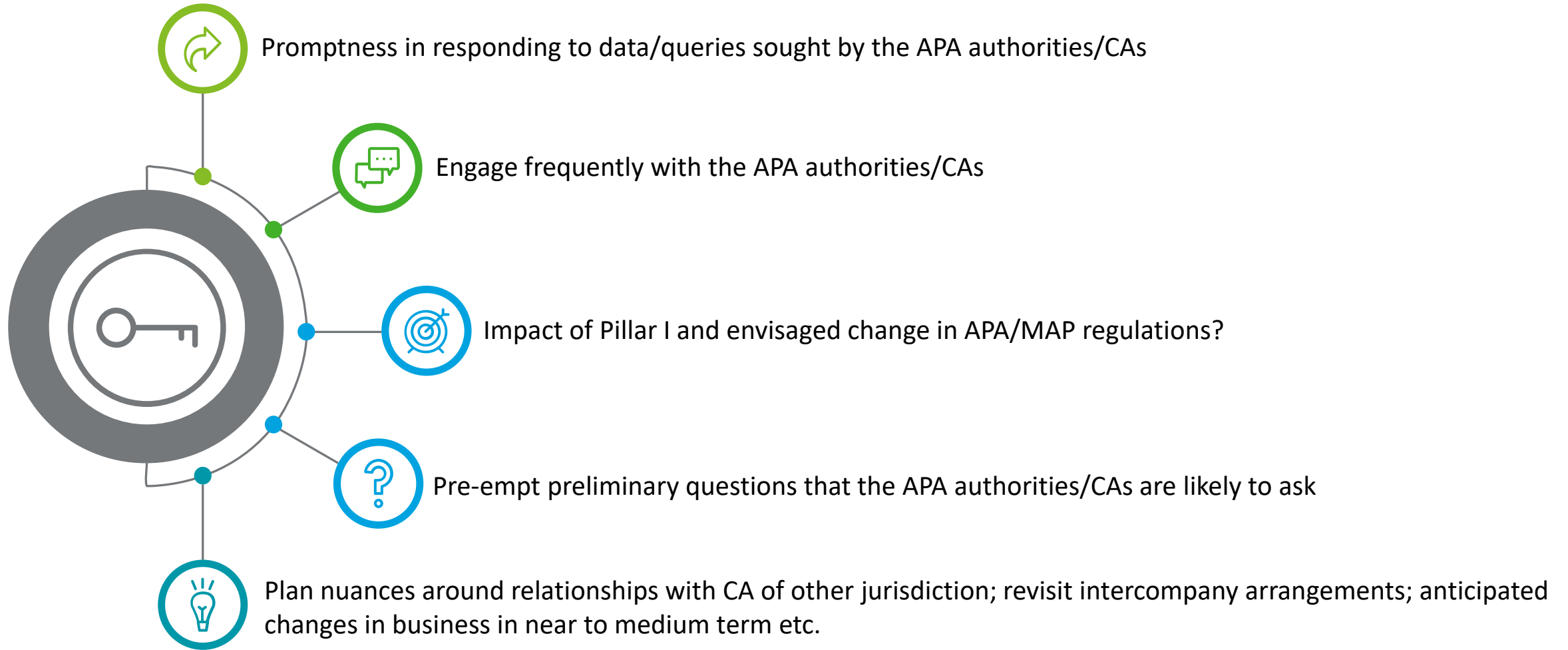


Issues for discussion

- Current experience with Indian APAs on a variable royalty?
- Global experience in APA resolutions on a variable royalty?
- Variable royalty vs. Residual royalty?



Key takeaways



Question and answer

Thank you!

Please take a minute to help us with your feedback for today's session...



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