

F No 142/26/2015-TPL
Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes

New Delhi, Dated 23rd May, 2016

Subject: Manner of determination of fair market value and reporting requirement for Indian concern-Indirect transfer provisions-section 9(1) of the Income-tax Act, 1961-Draft Rules-reg.

Under section 9 of the Income-tax Act, 1961 (the Act), income arising from indirect transfer of assets situated in India is deemed to accrue or arise in India. The provisions of section 9(1)(i) of the Act provides that if any share or interest in a foreign company or entity derives its value substantially from the assets located in India, then such share or interest is deemed to be situated in India. Thereby, any income arising from transfer of such share or interest is deemed to accrue or arise in India.

2. The share or interest is said to derive its value substantially from assets located in India, if fair market value (FMV) of assets located in India comprise at least 50% of the FMV of total assets of the company or entity. The computation of FMV of Indian and global assets is to be in the prescribed manner.

3. Further, section 285A of the Act mandates reporting requirement on the Indian concern through or in which the foreign company or entity holds the assets in India. The information to be furnished and its manner is also required to be prescribed.

4. Therefore, the manner of computation of FMV of assets of the foreign company or entity and the reporting requirement by the Indian concern are proposed to be provided through the amendments of the Income-tax Rules, 1962. The draft rules and forms, on which **comments and suggestion of stakeholders and general public on the draft rules and forms as above may be sent electronically by 29th May, 2016 at the email address, ustpl1@nic.in** in this regard, are as under:

11UB : Fair market value of assets in certain cases

(1) The fair market value of assets (tangible and intangible) as on the specified date, held directly or indirectly by a company or an entity registered or incorporated outside India (hereafter referred to as "foreign company or entity"), for the purposes of clause (i) of sub-section (1) of section 9, shall be computed in accordance with the provisions of this rule.

(2) Where the asset is the share of an Indian company listed on a recognized stock exchange not being the case referred to in sub-rule (2), the fair market value of the share shall be the observable price of such share on the stock exchange:

Provided that where the share is held as part of the shareholding which confers, directly or indirectly, any right of management or control in relation to the aforesaid company, the fair market value of the share shall be determined in accordance with the following formula, namely :-

Fair market value = (A+B) /C

Where,

A= the market capitalisation of the company on the basis of observable price of its shares quoted on the recognised stock exchange;

B= the book value of liabilities of the company as on the specified date;

C= the total number of outstanding shares:

Provided further that where, on the specified date the share is listed on more than one recognized stock exchange, the observable price of the share shall be computed with reference to the recognised stock exchange which records the highest volume of trading in the share during the period which is considered for determining the price.

(3) Where the asset is the share of an Indian company not listed on a recognized stock exchange on the specified date, the fair market value shall be the fair market value on such date as determined by a merchant banker or an accountant in accordance with any internationally accepted pricing methodology for valuation of shares on arm's length basis and increased by the liability, if any, considered in such determination.

(4) Where the asset is an interest in a partnership firm or in a limited liability partnership or an association of person, the fair market value shall be the proportional enterprise value on the specified date of such firm or limited liability partnership or association of person, as determined by a merchant banker or an accountant in accordance with any internationally accepted valuation methodology as increased by the liability, if any, considered in such determination.

(5) The fair market value of the assets other than those referred to in sub-rules (2), (3) and (4) shall be estimated to be the price it would fetch if sold in the open market on the specified date as determined by a report from a merchant banker or an accountant as increased by the liability, if any, considered in such estimation.

(6) The fair market value of all the assets of the foreign company or the entity shall be determined in the following manner, namely:-

(i) Where the transfer of share of, or interest in, the foreign company or entity is between persons who are not associated persons and the consideration for transfer of share or interest is determined on the basis of a report prepared by an accountant or merchant banker of international repute, then the fair market value of all the assets of the foreign company or the entity shall be the value determined in such report as increased by the aggregate amount of liabilities, if any, that have been reduced for computing the value of assets for determination of such consideration;

(ii) In any other case, -

(a) Where, as on the specified date, the share of the foreign company or entity is listed on a stock exchange, the fair market value of all the assets owned by the foreign company or entity shall be determined in accordance with the following formula, namely:-

Fair market value of all assets = A+B

Where,

A = Market capitalization of the foreign company or entity computed on the basis of the observable price of the share on the stock exchange where the share of the foreign company or the entity is listed;

B = book value of the liabilities of the company or the entity as on the specified date:

Provided that where, as on the specified date, the share is listed on more than one stock exchange, the observable price in the aforesaid formula shall be in respect of the stock exchange which records the highest volume of trading in the share during the period which is considered for determining the price.

(b) Where, as on the specified date, the share in the foreign company or entity is not listed on a stock exchange the value of all the assets owned by the foreign company or entity shall be determined in accordance with the following formula:

Fair market value of all assets = A+B

Where,

A = fair market value of the foreign company or the entity and its subsidiaries on a consolidated basis as determined by a merchant banker or an accountant as per the most appropriate internationally accepted valuation methodology;

B = book value of liabilities of the company or the entity as on the specified date.

(7) The rate of exchange for the calculation in foreign currency, of the value of assets located in India and expressed in rupees shall be the telegraphic transfer buying rate of such currency as on the specified date.

Explanation : For the purposes of this rule and rule 11UC, -

- (i) "telegraphic transfer buying rate" shall have the meaning as assigned to it in the Explanation to rule 26;
- (ii) "observable price" in respect of a share quoted on a stock exchange is the higher of the following:-
 - (a) the average of the weekly high and low of the closing prices of the shares quoted on the said exchange during the six months period preceding the specified date; or
 - (b) the average of the weekly high and low of the closing price of the shares quoted on the said exchange during the two weeks preceding the specified date;

- (iii) "book value of the liabilities" means the value of liabilities as shown in the balance-sheet of the company or the entity as the case may be, excluding the paid-up capital in respect of equity shares/members' interest.
- (iv) "specified date" shall have the meaning as assigned to it in clause (d) of Explanation 6 to clause (i) of subsection (1) of section 9;
- (v) the terms "accountant", "merchant banker" and "recognised stock exchange" shall have the meaning as assigned to them in rule 11U;
- (vi) "balance sheet" , -
 - (a) in relation to an Indian company, means the balance-sheet of such company (including the notes annexed thereto and forming part of the accounts) as drawn up on the specified date which has been audited by the auditor of the company appointed under the laws relating to companies in force and where the balance-sheet on the specified date is not drawn up, the balance-sheet (including the notes annexed thereto and forming part of the accounts) drawn up as on a date immediately preceding the specified date which has been approved and adopted in the annual general meeting of the shareholders of the company;
 - (b) in any other case, means the balance-sheet of the company or entity (including the notes annexed thereto and forming part of the accounts) as drawn up on the specified date or as drawn up on a date immediately preceding the specified date and which has been submitted to the relevant authority outside India under the laws in force of the country in which the foreign company or the entity is incorporated or established.

11UC : Determination of Income attributable to assets in India

(1) The income from transfer outside India of a share of, or interest in, a company or entity referred to in clause (i) of sub-section (1) of section 9, attributable to assets located in India ,shall be determined in accordance with the following formula, namely: –

$$A \times \frac{B}{C}$$

Where

A = Income from the transfer of the share of, or interest in, the company or the entity computed in accordance with provisions of the Act as if such share or interest is located in India.

B = Fair Market Value of assets located in India as on specified date, from which the share or interest referred to in A derives its value substantially, computed in accordance with rule 11UB.

C = Fair Market Value of all the assets of the company or entity as on specified date, computed in accordance with rule 11UB:

Provided that if the transferor of the share of, or interest in, the company or entity fails to provide the information which is necessary for the application of the aforesaid formula then whole of the income from the transfer of such share or interest shall be deemed to be attributable to the assets located in India.

(2) The transferor of the share of, or interest in, a company or entity that derives its value substantially from assets located in India, shall obtain and furnish along with the return of income a report in Form 3CT duly signed and verified by an accountant providing the basis of the apportionment in accordance with the formula and certifying that the income attributable to assets located in India has been correctly computed.

114DB. Information or documents to be furnished under section 285A.

(1) Every Indian concern referred to in section 285A shall, for the purposes of the said section, maintain and furnish the information and documents in accordance with this rule.

(2) The information shall be furnished in Form 49D electronically under digital signature to the Assessing Officer having jurisdiction over the Indian concern within a period of ninety days from the end of the financial year in which any transfer of the share of, or interest in, a company or entity incorporated outside India (hereafter referred to as "foreign company or entity") referred to in the Explanation 5 to clause (i) of sub-section (1) of section 9 has taken place:

Provided that where the transaction in respect of the share or the interest had the effect of directly or indirectly transferring the right of management or control in relation to the Indian concern, the information shall be furnished in the said form within thirty days of the transaction.

(3) The Indian concern shall maintain the following (an English translation has to be prepared if the documents originally prepared are in foreign languages) and produce the same when called upon to do so by any income-tax authority in the course of any proceeding to substantiate the information furnished under sub-rule (2), namely: -

- (i) details of the immediate holding company or entity, intermediate holding company or companies or entity or entities and ultimate holding company or the entity of the Indian concern;
- (ii) details of other entities in India of the group of which the Indian concern is a constituent ;
- (iii) the holding structure of the shares of, or the interest in, the foreign company or entity before and after the transfer;
- (iv) any transfer contract or agreement entered into in respect of the share of, or interest in, any foreign company or entity that holds any asset in India through, or in, the Indian concern;
- (v) financial and accounting statements of the foreign company or the entity which directly or indirectly holds the assets in India through, or in, the Indian concern for two years prior to the date of transfer of the share or interest ;

- (vi) information relating to the decision or implementation process of the overall arrangement of the transfer;
- (vii) information relating to, -
 - (a) the business operation;
 - (b) personnel;
 - (c) finance and properties;
 - (d) internal and external audit or the valuation report, if any, forming basis of the consideration in respect of share, or the interest, of the foreign company or the entity being transferred and its subsidiaries, which directly or indirectly hold the assets located in India through, or in, the Indian concern;
- (viii) the asset valuation report and other supporting evidence to determine the place of location of the share or interest being transferred;
- (ix) the details of payment of tax outside India, which relates to the transfer of the share or interest;
- (x) the valuation report in respect of Indian assets and total assets duly certified by a merchant banker or accountant with supporting evidence;
- (xi) documents which are issued in connection with the transactions under the accounting practice followed.

(4) The Principal Director General of Income-tax (Systems) or Director General Income-tax (Systems), as the case may be, shall specify the procedure for filing of Form No. 49D and shall also be responsible for evolving and implementing appropriate security, archival and retrieval policies in relation to the information so furnished under this rule.

(5) The information and documents specified in sub-rule (3) shall be kept and maintained for a period of eight years from the end of relevant assessment year.

Explanation: For the purposes of this rule,-

- (i) "ultimate holding company or entity" means a company or the entity that has ultimate control of the Indian concern directly or indirectly and such company or entity is not itself controlled by or is subsidiary of any other company or entity ;
- (ii) "intermediate holding company or entity" means a company or an entity that has controlling interest in another company or entity and is itself controlled by or is subsidiary of another company or entity;
- (iii) "immediate holding company or the entity" means the company or entity that directly maintains the controlling interest in the Indian concern'.

5. The following Forms are proposed to be provided:

(A)

FORM NO. 3CT
[See rule 11UC]

**Income attributable to assets located in India under
section 9 of the Income-tax Act, 1961**

* I/We have examined the accounts and records of M/s **
(name and address of the assessee) having PAN being transferor of the

share of, or interest in,(name of company or entity incorporated outside India)# referred to in Explanation 5 to clause (i) of sub-section (1) of section 9 during the previous year ended on

*I/We have obtained all the information and explanations which to the best of my/our * knowledge and belief were necessary for the purposes of ascertaining the income of the said assessee attributable to the assets located in India .

I/We certify that in respect of the assessment year the income deemed to accrue or arise in India to the assessee on transfer of share/interest in the above mentioned company/entity* is Rs..... which has been worked out on the basis of the details given in the Annexure to this form. In my/our * opinion and to the best of my/our * information and according to the explanations given to me/us * the particulars given in the Annexure are true and correct.

Date .

Signed
 ‡ Accountant
 Membership No. _____

ANNEXURE

1. Details of consideration received for transfer of share or interest:

Sr.No	Name of the company /entity	Quantum of share/interest transferred	Cost of acquisition of share /interest	Date of transfer	Consideration received

2. Income derived from transfer of share or interest. (company/ entity wise details) Rs.....
3. Value of assets located in India from which the share or interest derives its value (company/ entity wise details): Rs.....
4. Value of global assets of the company or the entity (entity wise details) : Rs.....
5. Income attributable to assets located in India(entity wise breakup and aggregate) Rs.....
6. Details of the method employed for arriving at the value of assets in item 3 and 4.
7. Details of the documents and valuation report, if any, relied upon
8. Remarks including any assumption made.";

(B)

FORM NO. 49D
[see Rule 114DB]

Information and documents to be furnished by an Indian concern under section 285A

To
The Assessing Officer

PART A

1.	Name and address of the Indian concern	
2.	Status [whether company, LLP/firm/permanent establishment etc.]	
3.	Residential status	
4.	Permanent Account Number	
5.	Previous Year	
6.	Assessment Year	
7.	Details of immediate holding entity, intermediate holding entity and ultimate holding entity, - (A) Immediate holding entity: - (a) Name (b) Country of incorporation (c) Country of which it is tax resident (B) Intermediate holding entity: - (a) Name (b) Country of incorporation (c) Country of which it is tax resident (C) Ultimate holding entity: - (a) Name (b) Country of incorporation (c) Country of which it is tax resident	
8.	(a) Whether share of, or interest in, any company or entity derives its value substantially from assets located in India, which are held in or through, the Indian concern; (b) If yes, give details of the company (ies) or entity (ies).	Yes/No

PART B

[To be filled in to report the transaction resulting in transfer of right of management or control]

9.	Whether any transaction in respect of share of, or interest in, any company or entity referred to in 8 has the effect of transferring the right of management or control over the Indian	Yes/No
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	<p>concern. If yes give details.</p> <p>(i). Name of the company or entity (ii). Details of the transactions including consideration for such transaction (iii). Name of transferor along with address (iv). Percentage share/interest transferred including percentage holding of transferor during the period of 12 months preceding the transfer (v). Details of the transferee along with address (vi). Holding structure in respect of shares of, or interest in, the company or entity before and after the transfer (vii). Financial and accounting statements of the company or the entity (viii). Basis of determining the location of share or interest being transferred (ix). Value and breakup of assets of the Indian concern immediately before the date of transfer (x). Basis of valuation of assets of the company or entity (xi). Details of supporting documents in respect of items (viii) and (x)</p>	
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PART C

[To be filled for reporting the information in respect of transfer of share/interest during the previous year]

10.	<p>(a) Whether share of, or interest in, the company or entity referred to in 8 has been transferred during the previous year, the income from which is deemed to accrue or arise in India under the provisions of section 9(1). (b) If yes give details: -</p> <p>(i). Name of the company or entity (ii). Details of the transaction(s) (iii). Name of transferor along with address (iv). Percentage share/interest transferred including holding percentage of transferor during the period of 12 months preceding the transfer (v). Value of total assets of the company or the entity (vi). Details of transferee along with address</p>	Yes/No
11.	<p>Whether any transaction in respect of shares of, or interest in, any company or entity referred to in 8 has the effect of transferring right of management or control over the Indian concern. If yes give details.</p> <p>(i). Name of the company or entity (ii). Details of transactions including consideration (iii). Name of transferor along with address (iv). percentage share/interest transferred including</p>	Yes/No

	<p>holding percentage of transferor during the period of 12 months preceding the transfer</p> <p>(v). Details of transferee along with address</p> <p>(vi). Whether Form 49D was furnished in respect of the transaction</p> <p>If yes date of furnishing Form 49D ___/___/___</p> <p>If No ,- (a) reason for not furnishing the Form 49D (b) furnish the following details:</p> <p>(i). Holding chart in respect of shares of, or interest in, the company or entity before and after the transfer</p> <p>(ii). Financial and accounting statements of the company or entity</p> <p>(iii). Basis of determining location of share of, or interest in, the company or entity</p> <p>(iv). Value and breakup of assets of the Indian concern immediately before the date of transfer</p>	Yes/No
12.	<p>Value and breakup of assets of the Indian concern, -</p> <p>(i). at the beginning of the year</p> <p>(ii). at the end of the year</p>	
13.	Basis of valuation of assets referred to in items 10(v), 11(b) (iii) and (iv) and 12.	
14.	Details of supporting documents in respect of items 10(v), 11(b)(iii) and (iv) and 12.	