CHAPTER-VIII
Conclusion and Suggestion
CHAPTER VIII

Conclusion & Suggestion

8.01. General Conclusion

After thorough discussion of the research topic in the foregoing chapters the following conclusions are drawn, based on the research conducted in this area. The problem of transfer pricing from an International taxation perspective is very hot topic involves many complexities, for which it is not treated as exact science. The conclusions drawn in this chapter are based on the theoretical discourses and they hold well as on the date of submission of this work. It is further submitted that all conclusions drawn are based on facts available at the time of completion of this thesis. The following concluding remarks are based on the discussion made in each chapter of this work.

In general the Thesis aims in making attempt of comprehensive analysis of International Transfer pricing in India in comparison with the developed countries like USA, UK, and Australia. It extends prior studies by examining the various methods of practice and its relevant importance of environmental variables that affects their choice of transfer pricing methods within a developing economy framework. This thesis also makes attempt that how tax compliance study based on the international transfer pricing decisions. By and large it can be said both the developed and developing countries are facing fundamental problem with respect to the exactness of the concept of Arm’s length principle in the absence of the case law with public good features. But the procedure which adopted in the Arm’s length principle are much superior to the other existing options like the system of Global formulary apportionment and consolidated base taxation and also the described concept of CCCBT(Common Consolidated corporate Base Taxation) which are existing in the European countries. The said conclusion has arrived after making the comparative study of the methods followed by the developed and developing countries, case laws decisions given by the jurisdictional courts and application of the principles of Arm’s length standard in the prevailing situations and also in consonance with the current structure of international taxation.

The main purpose of the this research is to improve the knowledge about the method used by most of multinational companies in tax avoidance and the knowledge
about the arm’s length principle and the other methods which is followed in solving the issue of Transfer pricing criteria. It is also true that the multinational enterprises exercise more power in less developed economies is the root cause of less strict implementation and regulations that combat transfer mispricing.

Increasing globalization, sophisticated communication systems and information technology allow an MNE to control the operations of its various subsidiaries from one or two locations worldwide. Trade between associated enterprises often involves intangibles. The nature of the world on which international tax principles are based has changed significantly. All these issues raise challenges in applying the arm’s length concept to the globalised and integrated operations of international enterprises. Overall, it is clear that in the 21st century the arm’s length principles present real challenges in allocating the income of highly integrated international enterprises.

It is also widely accepted that the transfer pricing is not an exact science and that the application of transfer pricing methods requires the application of information, skill and judgment by both taxpayer and tax authorities. In view of the skill, information and resource “gaps” in many developing countries, e.g., like India the task of solving transfer pricing issue often requires the best officials, who can handle the intricacies with their special skills. The intention of this thesis is to make an attempt to bridge the gap between the developed and developing countries which deals with the challenges faced by both the taxpayers and tax administrations in the developing countries which are of very useful to day to day problems of the practical situations. This study is made by way of comparing the practices adopted by the developed countries and developing countries with respect to traditional transaction methods versus transaction profit methods which comply by way of Arm’s length principle and other methods before tax authorities.

The results reveal that the various factors like foreign exchange, control risks, good relationships with local government, various biometric factors like lifestyles, their pattern, labor management and other factors contributes lot in deciding the choice of transfer pricing methods. In this process of examination It has been found that lot of domestic factors which involve in the process of adopting the transfer pricing methods by choice of selection. Most of the foreign owned enterprises, cooperative joint ventures and export oriented FIEs are more likely to manipulate
their transfer prices and shift their profits out from high taxed jurisdictions to achieve their strategic objectives. The empirical results are consistent with the theoretical predictions. Future research can investigate the related party transactions entered between the management and companies themselves, which are very common in developed countries.

An appropriate transfer price scheme can help to enhance Multinational Corporation’s competitiveness in the international market, facilitate management of cash flow, motivate subsidiary managers and thereby induce goal congruence.418

Prior studies examined the transfer pricing methods commonly used by Multinational Corporations in developed countries and role of certain important environmental variables in their transfer pricing considerations. My thesis examined the methodologies adopted by the various countries and how far they are able to check the erosion of Revenue to the Government. The analysis of Data reveals that the methods adopted by USA, UK Australia are all based purely on the OECD norms of adopting the International standard of Arm’s length principle. In India the theory of most appropriate methods adopted by the Indian practices have much edged advantage in providing the humane aspects from the angle of MNCs. An attempt has made to protect the rights of the Tax payers in congruence with Tax administration have been attempted.

By introduction of the transfer pricing legislation there is an attempt to balance the difference between the fundamental principles. The OECD guidelines are very subjective and based on the concept of self restraint and self-compliance by the MNC’s. The same are followed in India under Income Tax Act, 1961. In the concept of global village, the free trade is to be promoted and the most restraining factor for the same is sovereignty of the nations. The welfare principles and social welfare duties of the governments compel them for rightful tax collection through legislation, whereas the capitalist principles motivate for global profits maximization. The transfer pricing legislation is an attempt to marry two opposite principles prevailing in the economy. The need for the same has arisen from the fact that the governments perceive that they are losing rightful revenue due to transfer price

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418 Baristow, Nigel (June 11, 2011) Transfer pricing, Slideshare.net. available at http://www.slideshare.net/nbairstow/international-transfer-pricing-8277178 (retrieved on April 08 2014)
management by MNC’s by lack of self-restraint and self-compliance and the MNCs perceive that their freedom for global management is constrained by this legislation and all legal ways and means are to be used for profit maximization. It is imperative for the concept of global village to flourish in public interest, that the MNC’s accept the responsibility of social cause of giving back to the society which gave the business profits, by adopting self declaration mechanism and accepting the needs of local governments. At the same time the governments accept the fact that the MNC’s are there to earn profits and only rightful tax is to be demanded from them.

The right rope walk of need to marry the opposite principles of welfare economics and capitalism is possible not by legislation but by self-imposition and respect to each other’s principles by the MNC’s and the governments, through reasonable profitability, reasonable and simple tax mechanism. This can be better achieved through a forum for mutual agreement. The idea of the relative importance of transfer pricing as a tax issue, can be gained from the often -quoted statistic that over 60% of world trade takes place within MNEs and so potentially gives rise to transfer pricing issues. Further the dramatic expansion in world trade and investment in the last decade of this century confirms the absolute importance of transfer pricing in terms of tax at stage.

The heart of the subject is to consider the methodologies practiced by the states and the guidelines accepted by the states shows that the OECD guidelines prefer CUP methods to other traditional methods (RPM and CPM) and the transactional methods (PSM and TNMM) are considered as last resort methods under the Indian regulations, there is no statutory preference for any method to determine the arm’s length price. Instead, it advocates the usage of the ‘Most Appropriate Method’ to the transaction. Use of most appropriate method to compute the arm’s length price has been a subject matter of debate. The Practical experience shows that TNMM is by far the most widely used method in India the paucity of publicly available data often leaves the parties concerned with no choice but to apply TNMM in preference to other methods. Moreover, in contrast to other methods, the comparability criteria for application of TNMM are also less stringent. The Income

419 OECD transfer pricing Guidelines for Multinational Enterprises and Tax Administrations: and OECD discussion Draft on Transfer Pricing Aspects of Business Restructuring reported in September 2008

420 An internal analysis of all TP reports filed in the Delhi Tax office found that TNMM was used in 92% of the cases- News report dated 19th October 2008.
tax Appellate Tribunal in *E-Gain Communication Pvt Ltd vs. ITO, Pune* has observed that the TNMM if used with appropriate adjustments to account for functional and other differences can provide solutions to insoluble transfer pricing problems. To this extent there is no relegated preference to the transactional methods as compare to the traditional methods. It is important that the taxpayer is able to establish that the method selected by him is the most the most appropriate one and enables computation of the arm’s length price.

The Indian regulations do not allow usage of more than one method. However, in practice, taxpayers sometimes use additional methods as supplementary methods, which are found to be useful when ultimately the tax authorities reject the first method and alternate methods.

The attempt made by the OECD in solving the dispute that is existent in the field of Transfer pricing is of very good length. to summarize the total attempt that are made by the OECD Model Tax convention and UN Model Tax convention on the various issue like application of the norms of Arm’s length principle, guidelines given both to the developed economies and developing economies in making attempt to solve the issue of the comparability of the data, providing instructions to the less developed economies mutual assistance is outstanding service for the development of economies of the world. Also the other methods proposed by the OECD in order to solve the issues of Transfer pricing like formula apportionment method (unitary taxation), the method adopted by the European Union called CCCTB were discussed in length to find out the real problem of the Transfer pricing issues and its practices for the purpose of clear understanding of the methods followed by various countries of the world.

The OECD Transfer Pricing Guidelines provide a framework for settling such matters by providing considerable detail as to how to apply the arm’s length principle. By and large the best possible worlds, where tax authorities and MNEs work together in good faith were made by the OECD guidelines.

Applying transfer pricing rules based on the arm’s length principle is not easy even with the help of the OECD’s guidelines. It is not always possible and certainly takes valuable time-to find comparable market transactions to set an acceptable

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transfer price. A computer chip subsidiary in a developing country might be the only one of its kind locally. But replacement systems suggested so far would be extremely complex to administer. One particular problem is the need to find comparable transactions between independent parties.

Most frequently, it has been advocated for an alternative for the purpose of solving the transfer pricing methodologies is some kind of Formulary apportionment method. Here, as discussed the application is to split the entire profit of an MNE group amongst all the subsidiaries in the various locations in which it operates. This would be done without any reference or comparison to profits that would be earned by independent enterprises performing similar activities in those locations. Instead the profits are allocated to locations by a pre-set formula. The formula uses a number of factors, such as sales, payroll and assets and other factors relevant from the formula-based angels. The three factor formula that allocated 50% profits to sales and 25% to payroll and 25% to assets thereby double weighting the sales factor. The simplest way is to evaluate any alternative by reference to well established tax policy benchmarks such as neutrality, fairness, certainty, administering ability, simplicity and robustness etc., this could have to be done by judging consciously and not mechanically and would recognize the inherent trade-offs between different tax policy benchmarks. Arm’s length principle has a long history, for example it is found in the League of Nations Model Tax Conventions that formed the international consensus in the first half of this century.

Formulary apportionment has been around just as long it was one the three methods used for attributing profit to a permanent establishment under article 5 of the League of Nations Model Tax Conventions. One reason for longevity is that, although the principle has remained the same, the ways of applying that principle in practice, have continually evolved to take into account changing economic circumstances and business practices. One positive outcome of the political debate in the United States in the early 1990s as to whether the ALP should be replaced by formulary apportionment, was the recognition that the last published guidance on applying the ALP in practice, the 1979 OECD Report on Transfer Pricing needed updating resulting which the revised OECD Transfer Pricing Guidelines published in 1995 tried to deal with many of the problems identified by the proponents of formulary apportionment. The three developments are worth particular attention as
they demonstrate the flexibility of the ALP. First development relates to comparability and the recognition that the comparability standard had perhaps been interpreted too strictly in the past. Second development relates to methods. The third development relates to the development of novel administrative approaches to resolving transfer pricing disputes.

Under the concept of development one such development concerns is advance pricing arrangements (APAs). Traditionally transfer pricing audits have examined events that occurred sometime in the past and tried to evaluate whether the ALP was being applied properly at that time. The OECD has published guidance for conducting APAs under the mutual agreement procedure (MAP APAs) with the intention of making the MAP APA process more transparent, more efficient and to improve the consistency of application of MAP APAs.

Another challenge to be met is to ensure that the ALP and the OECD transfer pricing Guidelines are recognized as the international standard by all countries, regardless of whether or not they are members of the OECD. It is fact that the number of non-member countries are encouraging by the member countries adopted transfer pricing legalization and these have been based on the ALP and have followed to varying extents, the approach in the OECD Guidelines. The practical drawback of the good comparables is a symptom of the deeper conceptual problem that the arm’s length standard cannot account for the economic benefits which lead to the creation of multinational enterprises.

The concept of the CCCTB (common consolidated corporate Tax Base) has been adopted by the European commission as a comprehensive solution which would do away with all these tax obstacles in a single stroke. The basic feature of the CCCTB is harmonization of the corporate income tax base. As with arm’s length standard, formulary apportionment under the CCCTB would serve a double function: it would allocate a share of the consolidated profit to each group entity and at the same time allocate taxing rights to the member states involved.

Transfer pricing issues arising from the electronic commerce were neither fundamentally new nor different. For the reason of not developing good cases with clear cut doctrines the subject of Arm’s length standard is unable to provide the
taxpayer a with a clear sense of how they are expected to behave in the legal system in which they operate. This scenario explains the worldwide arm’s length crisis\(^{422}\).

**Summary of the Results**

This thesis basically a comparative study with respect to Arm’s Length principle between the Developed countries and developing countries draws its importance in the area of adoption of various methods when the situation warrants. No single method is the standalone method for the determination of the choice of Arm’s length principle. Certain time when situation warrants the ALS(Arm’s Length Principle) will holds good in the prevailing situation, certain times the alternative method which was advocated by the U.S. like Formulary apportionment system will holds good in a very few situation for the betterment of the public (Tax payer) vs. the Government. The dogmatic adherence to the following of Traditional Transaction method always will not holds good in a situation existing in most of the developing countries. The reasons for applying the particular principle is the reason itself prevailing on the circumstances. The findings of this thesis are of particular relevance to the developing countries in enhancing our understanding of environmental influences on transfer pricing decisions, and thus contribute to the building of a more comprehensive theoretical framework of transfer pricing problem in developing economies. Apart from this it is guideline for the foreign investors who are operating in India to understand the significant implication of methods followed by the Tax department before laying footsteps in the country like India. To this extent the management can consider the relative importance of various factors in setting or revising their transfer pricing policies. This research will be of much interest to the academic research scholars who are interested in international law and its wide application of the taxation regime and also to the MNCs for their better understanding of the Transfer pricing policies prevailing in Indian legislation. In addition to this the important factor prevailing in the country like India is prevailing socio-economic policies with Agricultural backbone with huge population. The findings of the research should not be generalized to other developing countries without taking into account the prevailing situation of that particular country based on the business environment, various socio-economic factors. Therefore the findings

\(^{422}\) Eduardo Baistrocchi “Transfer Pricing in the 21st Century: A proposal for both developed and developing countries” accessed on [http://escholarship.org/uc/item/54k8q9vf](http://escholarship.org/uc/item/54k8q9vf) on 20.03.2015 at A.M
of this research should be considered useful reference tool for other developing economic in enhancing their understanding of MNC’s transfer pricing behaviors.

The adoption of the Traditional Transaction method and Transactional profit split method as enshrined in the OECD Guidelines is not the only method to solve the problem of Arm’s length principle for the developed and developing economies of the world. In fact this transfer pricing legislation is not sufficient to resolve all the international tax issues that may arise for a country. While transfer pricing legislation is part of the measures needed to tackle international tax avoidance, it does not replace anti-abuse rules and or controlled foreign companies’ legislation that may be needed to fight abusive transactions. By and large after discussion of the various case laws and methods followed in each case to decide the congruence of the Transfer pricing problem and after the verifying the facts of the various cases it is observed that the arm’s length principle developed decades ago which has the occupied the state of soundness in theory has met with fatal accidents by various courts and Tribunals while deciding particular cases. If the transfer pricing rules and regulations were to be examined, directly from the OECD it would become evident that the transfer pricing methods proposed are merely suggestions. Originally these transfer pricing rules from OECD were put into place to protect businesses from double taxation and encourage cross border trade. According to the OECD developing and transitioning countries can benefit from this principle.

8.01.1. Hypothesis Examination (Testing of Hypothesis):

**Hypotheses One:**

1. Transfer pricing regulations are important as they address issues of preserving the rights of a country to tax profits that can reasonably be considered to arise within its territory and contain rules that provide a fair basis of computing arm’s length prices. The Transfer pricing regulations provide a statutory framework for computation of reasonable, fair and equitable profits and tax. The Government should therefore try to ensure that regulations adopted are internationally acceptable and create a balance in efforts of raising revenues and potential Taxation.

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423 OECD Transfer pricing Legislation A suggested approach June 2011
424 Ibid .p 212
425 OECD Transfer pricing Legislation- A suggested Approach June 2011
Transfer pricing policies and practices are established when physical goods as well as services and intangible property are charged among associated business entities. The idea of framing Transfer pricing guidelines is to culmination of the efforts made by the International community in order to review the existing standard and adapt them to the modern business world. The OECD (Organization for Economic cooperation and Development) Transfer pricing Guidelines 1995 made it clear that the concept of Transfer pricing should not be confused with the tax fraud or tax avoidance even though transfer pricing transactions may be used for these purposes. The arm’s length principle established in article 9 of the OECD Model Tax Convention in nutshell defines how the adjustability concept of the of Transfer price. Accordingly the term Transfer price is an adjust price, which includes the profits of one enterprise in the profits of an associated enterprise, pure redistribution of profits among taxpayers. Like one increase in profit the other decreases and also protecting the revenue of the nations. The term Transfer price assumes the significant effect of revenue collection of the various countries. Because of manipulations under the transfer pricing policies, countries lose out their genuine share of tax, which they are entitled to collect on the transactions which take place. The principles of Arm’s length Standard are of world wide acceptance as a high value in itself (reported in OECD Guideline 2010) also it has been accepted by most of the member countries and non member countries also. ALS constitutes an international custom and international law. The ALS work effectively in the majority of the cases together with possibility of making adjustments, which reveals great importance in what concerns the double taxation. It is evident that the regulations adopted by the Government are of International Standard, the concept of Arm’s length principle has attained the standard of peremptory norm (Jus cogens) thereby causes treaty obligation. In view of the above facts and circumstances the researcher accepts the hypotheses formulated as “The Transfer pricing regulations provide a statutory framework for computation of reasonable, fair and equitable profits, tax and also the regulations are important as

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they address issues of preserving the rights of a country to tax profits that can reasonably be considered to arise within its territory and contain rules that provide a fair basis of computing arm’s length prices”.

**Hypotheses 2:**

2. The rules framed by the Transfer pricing regulations protect the tax base of a country and provide a mechanism to collect its due share of tax. Provisions of the Transfer pricing regulations ensure income of group enterprises are apportioned fairly between the countries concerned and at the same time tax base of the country are protected. But the government in their desire to collect the due share should not ignore the difficulties experienced by the enterprises in satisfying the regulations of the countries concerned.

✓ The fact is that contracting states may rely on domestic law as authority to levy taxes. Since, generally tax treaties do not broaden taxing rights. These rules are normally known as golden rule. Therefore the right to make adjustments granted to the Contracting States must rely on the authority provided by domestic law. In this sense the tax treaties normally function by restricting the taxing rights under domestic tax law. Paragraph 2 of Article 9 of OECD Model Tax Convention is framed in such way that “conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly”. This means corresponding adjustment is established, in practice undertaken as part of the mutual agreement procedure, and protection of the Taxpayer is guaranteed, and Nations revenue is also protected without erosion. The idea of Transfer pricing is not only to anti-avoidance rules but it is also important to look to the rationality that underlies the tax system which had specifically created the provisions against these abusive arrangements. It can be said that actual transfer pricing standards are aimed at to guarantee that the allocation of taxing rights as established in the substantive provisions of domestic tax codes and other relevant tax legislation of the involved countries. Thus the government balances the collection of revenue and its distribution among the different state and the MNEs(Taxpayers) Transfer
pricing Guidelines. While they help corporations to avoid double taxation, they also help tax administrations to receive a fair share of the tax base of multinational enterprises. But abuse of transfer pricing may be a particular problem for developing countries, as companies might take advantage of it to get round exchange controls and to repatriate profits in a tax free form. The OECD provides technical assistance to developing countries to help them implement and administer transfer pricing Guidelines. The welfare principles and social welfare duties of the governments compel them for rightful tax collection through legislation, whereas the capitalist principles motivate for global profits maximization. *The transfer pricing legislation is an attempt to marry two opposite principles prevailing in the economy. The need for the same has arisen from the fact that the governments perceive that they are losing rightful revenue due to transfer price management by MNC’s by lack of self-restraint and self-compliance and the MNCs perceive that their freedom for global management is constrained by this legislation and all legal ways and means are to be used for profit maximization.* It is imperative for the concept of global village to flourish in public interest, that the MNC’s accept the responsibility of social cause of giving back to the society which gave the business profits, by adopting self declaration mechanism and accepting the needs of local governments. At the same time the governments accept the fact that the MNC’s are there to earn profits and only rightful tax is to be demanded from them. In view of the above facts the researcher accepts the Hypotheses formulated as” The rules framed by the Transfer pricing regulations protect the tax base of a country and provide a mechanism to collect its due share of tax. Provisions of the Transfer pricing regulations ensure income of group enterprises are apportioned fairly between the countries concerned and at the same time tax base of the country are protected. Researcher is of the view that the Government acts as a mediator in protecting the revenue of the nation as well as protecting the rights of the Taxpayer.

**Hypothesis 3.**

3. In the course of International Transactions sometimes it is not easy to find comparable transactions and there may be no arm’s length price with which the price charged or received can be compared. Also there is gap between the developed and developing Nations with respect to Data availability in that
situation the choice of other methods or residuary method may be used and ambiguity in law should be avoided by maintaining certainty and simplicity in the application of the provisions.

The Arm’s length Standard is difficult to determine especially when no comparables are available. This usually happen in the case of intangible assets like patents, trademark, knowhow and e-commerce commodities, wherein the taxation of profits based on the physical presence in a certain jurisdiction becomes inadequate. On the other hand developing countries also face the problem but for an additional reason, their weak rule of law produces, frequent violation of *stairedecisis* making case law The process of companies and markets are increasingly more integrated not only by regional markets but also through globalization in general, it seems difficult to find comparable transactions among independent enterprises especially since such transactions are confidential, not easily unveiled either for the Tax Authorities or for the competitors’. Therefore the application of the arm’s length principle requires a great amount of data in order to establish the comparison between transactions and activities among related enterprises and the transactions and activities of independent enterprises. This constitutes costly administrative burden and time consuming imposed both to tax administrations and to the taxpayers. In such cases alternative method of solving transfer pricing issues like Global Formulary apportionment or the method like CCCTB (Europe) can be used to solve the problem of TP issue. Also the method or practice which were in existence called the Sixth method i.e., “accepting the use of publicly quoted commodity prices (herein after called Sixth method”) and its impact and effectiveness with arm’s length principle could be prepared. Wherever there is scope for comparability test the principle of Arm’s length standard may be used, and wherever there is no scope for comparability tests the other methods like Global Formulary can be used to solve the issues of Transfer pricing. Therefore the Researcher accepts the Hypotheses formulated as

In the course of International Transactions sometimes it is not easy to find comparable transactions and there may be no arm’s length price with which the price charged or received can be compared. Also there is gap between the developed and developing Nations with respect to Data availability in that situation the choice of other methods or residuary method may be used and
ambiguity in law should be avoided by maintaining certainty and simplicity in the application of the provisions.

**Hypotheses 4.**

4. The use of Other Methods⁴²⁷ is possible if it takes into account the price of same or similar uncontrolled transactions. The practical difficulty here is non availability of comparables. In such case Transfer pricing requires the exercise of judgments on the part of the tax administration and taxpayer. *But in the scenario of Indian position much rely is made on Transfer price methods resulting both the taxpayer and revenue authorities busy in deliberating the mystical number of Arm’s length price. Thereby the accuracy will become grey In such situation the Revenue must show the analysis is carried with “Judicial” after taking into account all the relevant factors into considerations, also if there is any other method prevailing for the purpose of determination of Transfer price like Formulary apportionment method practiced in US, Switzerland and CCCTB formula practiced in Europe. By making comparative study with these methods the moving towards accuracy can be achieved. Also the domestic laws of the country will play major role in acceptance of the Arm’s length principle practices throughout the world.\

✔ The application of the Arm’s length principles is difficult in certain situations, for the reason there is no express global definition of the arm’s length principle nor is it applied uniformly. On the other hand, the developing countries also face the Problem but for an additional reason, their weak rule of law produces frequent violations of *staredecisis* making case law a negligible source for predicting court decisions. Notwithstanding the reference to associated enterprise in article 9 of the OECD convention the fact is that there is often inadequate resolution of disputes arising from transactions since it requests the Contracting States attain an agreement on what is an acceptable arm’s length price to be paid for the transfer. Also it is true courts due to lack of consistence in analyzing the case and not

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⁴²⁷ The Income Tax Act, 1961 (Sixth Amendment ) Rules 2012 with retrospective effect from 01.04.2012 (for the Assessment year 2012-2013 onwards) for the purpose of clause (f) of sub-section (1) of Section 92C the other method for determination of the arm’s length price in relations to international transaction shall be any method which takes into account the prices which has been charged or paid or would have been charged or paid for the same or similar uncontrolled transaction with or between non-associated enterprises, under similar circumstances, considering all the relevant facts.
drawing any definite conclusion the concept of Arithmetic Mean wherein the law provides that “where more than one price is determined by the most appropriate method, the arm’s length price shall be taken to be the arithmetical mean of such prices or at the option of the taxpayer, a price that may vary from the arithmetical mean by an amount not exceeding 5% of the such arithmetical mean”. The principle of arithmetic mean is not followed when more than one price is obtained under different methods prescribed in law. Since transfer pricing is not an exact science and it is difficult to arrive at a single price under a particular method, the benefit of plus minus five percent is allowed (+/- 5%) in Indian regulations only.

The present International Tax system deals with MNEs as if they were separate entities operating in different countries. This results weak coordination between tax authorities allows separate account approach tremendous scope to MNE’s to shift their profits around the globe in to suit their tax affairs. Interaction may take place before dispute arises through advance pricing agreement(APA) programme aimed at offering tax administrations and taxpayers certainty with respect to transfer pricing for pre-determined period. The developing country’s tax administration may be attracted to an APA between taxpayers and Tax Administrators, Due to all the problems associated with the application of ALP, the idea of adopting the common corporate tax rules emerged in the European arena. By using Formula apportionment the interrelations occurred in a business group are also considered, though it constitutes a predetermined formula, it does not share the flexibility of the arm’s length principle. Hence it requires on the part of the Revenue to take a reasoned decision in dealing with issues of Transfer pricing,, also review of other potential alternative approaches and their application in practice may be useful to developing countries. Hence the researcher formulated the Hypotheses as the practical difficulty here is non availability of comparables. In such case Transfer pricing requires the exercise of judgments on the part of the tax administration and taxpayer. But in the scenario of Indian position much rely is made on Transfer price methods resulting both the taxpayer and revenue authorities busy in deliberating the mystical number of Arm’s length price. Thereby the accuracy will become grey In such situation the Revenue must show the analysis is carried with “Judicial” after taking into account all the relevant factors into considerations, also if there is any other method prevailing for the purpose of determination of Transfer price like
Formulary apportionment method practiced in US, Switzerland and CCCTB formula practiced in Europe. By making comparative study with these methods the moving towards accuracy can be achieved. Also the domestic laws of the country will play major role in acceptance of the Arm’s length principle practices throughout the world.

**Hypotheses 5**

5. *In the process of formulating new methods it is very important to counter harmful tax practices more effectively meaning many countries compete to provide certain tax breaks in their tax policies. This indirectly motivates or provokes the Multinationals to choose the country that offers most benefit for them to lower their global effective tax rate. Aggressive tax planning and race to the bottom competition will result in unfair practices. In such circumstances the commitment is required from the nation/countries to follow the golden rule of harmonization and practice of transparency and mutual understanding.*

✓ Multinational corporations and governments are major participants in the global economy and they view transfer pricing differently. Multinational corporations have an incentive to misprice transfer price for the purpose of minimizing tax in view of their primary goal of profit maximization. Therefore it is mandatory on the part of the developing and developed economies to have a sound regulation on Transfer Regulation on Transfer pricing. Tax planning involving tax avoidance is considered to be legal, or more exactly, not illegal. Multinational tax avoidance behavior is morally acceptable to government and tax authorities, at least based on the interpretation of current regulations and taxation laws. The three forms of tax planning like tax evasion, and tax fraud are fundamentally illegal. While tax avoidance lies in a grey area. It is a sort of legitimate from of tax planning which uses loopholes in laws and regulations for avoiding taxes. There is a fine line between tax avoidance and tax evasion. Beneficial tax regulations for the purpose of attracting foreign direct investments and tax haven are such economic phenomena under the circumstances of semi-globalization. Beneficial tax regulations induce tax difference which makes regulatory arbitrage possible resulting strong incentives for multinational corporations to shift their profits. The governments of developing countries are losing billions of dollars annually in tax revenue because of Multinational Corporation’s tax avoidance behavior via
transfer pricing manipulations. As referred in the cases SABMiller poses serious issues to the revenue of the Government. Hence the Government should be cautious while framing the rules too much reduction in tax rates causes incentives to MNEs to shift their bases at the country where tax rates are zero. This results in eroding the tax base of other country and Revenue loss to other country. Hence the Transfer pricing legislation is a *sina qua non* to marry the interest of the nations. The process of marrying can be achieved by mutual cooperation and understanding by both the Nations as well as the Taxpayer. Hence the researcher is of the view of the Hypothesis it is very important to counter harmful tax practices more effectively meaning many countries compete to provide certain tax breaks in their tax policies. This indirectly motivates or provokes the Multinationals to choose the country that offers most benefit for them to lower their global effective tax rate. Aggressive tax planning and race to the bottom competition will result in unfair practices. In such circumstances the commitment is required from the nation/countries to follow the golden rule of harmonization and practice of transparency and mutual understanding.

8.01.2. Answers to the Research questions

1. Why transfer pricing is so important to a developing country like India?

✓ India a developing economy in the world. Due to rapid globalization the concept of the Transfer pricing assumed so much importance in the present day world for the reason “Transfer prices directly affect the allocation of profits and losses to resident enterprises, and most countries levy a form of direct tax on the profits of enterprises resident within their tax jurisdiction. Transfer prices therefore can have a direct impact on a country’s tax base. If a country has a low tax rate, in the absence of an effective transfer pricing regime, transfer even lower tax rates in other countries. In order to protect its tax base from being eroded through transfer mispricing, a country needs to have in place appropriate transfer pricing legislation and must steps to ensure that it is effectively administered. Many developing countries lack effective Transfer pricing regimes, lacking appropriate transfer pricing legislation, sufficient administrative capacity to effectively implement the legislation, or both. If the country does not have proper effective regulations it may be losing significant tax revenues as a result of both intentional and unintentional transfer mispricing Hence it is very much important to have a
sound effective Transfer pricing regulations in a country and it is sine-qua non. To quote the wordings of the Finance Ministry “The increasing participation of multinational groups in economic activities in the country has given rise to new and complex issues emerging from transactions entered into between two or more enterprises belonging to same multinational group. The profits derived by such enterprises carrying on business in India can be controlled by the multinational group, by manipulating the prices charged and paid in such intra-group transactions, thereby, leading to erosion of tax revenues.”

2. **What is Transfer pricing Regulations framed by the Indian legislation?**


3. **Are these Transfer pricing regulations protecting the loss of revenue to jurisdictional country?**

✓ The aim and idea of framing regulations is itself to protect the revenue of the Nations. Transfer mispricing May happens in both domestic and International transactions which involves the cross border transactions. Certain times it may happen that if taxpayer is subject to differential treatment, it results in transfer mispricing undermining the operation of country’s domestic tax system. Several nongovernmental organizations (NGO’s) have tried to quantify the tax revenues forgone by developing countries from transfer mispricing Christian Aid estimates that capital flows from trade mispricing into the European Union and United States from non-EU countries during the period 2005-07 exceeded $1 trillion and that taxing these capital flows at current rates would have raised about
$121.8 billion a year in additional tax revenues. Oxfam estimates tax revenue losses from the shifting of corporate profits out of the developing countries at about $50 billion a year over the past decades. Transfer pricing has become one of the most important international tax issues faced by multinational enterprise group operating in developed transition, and developing economies. In order to ensure that their tax policy is not undermined, an ever increasing number of countries has introduced the specific transfer pricing regulations for direct taxation purposes and increased the resources allocated to building the capacity of their tax administrations. The time line of effective transfer pricing documentation rules, during the period 1994-2011 are shown in the figure with bar graph as under.

**Timeline of effective Transfer pricing documentation rules 1994-2011**

(Source: Based on Oosterhoff 2008 and research by Claudiu P. Dancul, World Bank Group 2007-2011 period)

The trend of introducing the new transfer pricing legislation, amending the existing legislation, investing in tax administration resources, and introducing or updating their compliance requirements. A number of countries with established transfer pricing regimes has increased their tax collection either domestic and international cross-border Transactions. *The transfer prices have a direct impact on a country’s tax base. For example, transfer prices for imported goods or services that are overstated can result in understatement of the taxable income of the local enterprise, and transfer prices for exported goods or services that are understated can result in understatement of the taxable income of the local enterprise. For the*

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enterprise in other country, the opposite effects are observed. To view the example of Indian case: The Directorate of International Taxation has collected taxes of Rs. 48,951 crore (F.Y 2010-2011 & 2011-2012) from cross-border transactions in the last few financial years as can be seen from the chart represented below.

**Collection from Cross-border Transactions 2002-2012 (Source: CBDT New Delhi 430)**

<table>
<thead>
<tr>
<th>Financial Year</th>
<th>Collection of International Taxation Directorate (Rs. In Crores)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002-03</td>
<td>1,356</td>
</tr>
<tr>
<td>2003-04</td>
<td>1,729</td>
</tr>
<tr>
<td>2004-05</td>
<td>4,418</td>
</tr>
<tr>
<td>2005-06</td>
<td>8,049</td>
</tr>
<tr>
<td>2006-07</td>
<td>9,147</td>
</tr>
<tr>
<td>2007-08</td>
<td>11,790</td>
</tr>
<tr>
<td>2008-09</td>
<td>15,740</td>
</tr>
<tr>
<td>2009-10</td>
<td>16,198</td>
</tr>
<tr>
<td>2010-11</td>
<td>21,509</td>
</tr>
<tr>
<td>2011-12</td>
<td>27,442</td>
</tr>
</tbody>
</table>

(Source: CBDT New Delhi 431)

The above data can be represented in the Bar chart and Pie chart for better understanding of the importance of Transfer pricing regulations wherein the Revenue to the Government is protected by way of Regulations under Transfer pricing regime. The bar chart represents as under reveals the fact the collection of Revenue over a period of time there is increase in growth of revenue collection from the beginning of the year 2002-03 (implementation of Transfer pricing regulation in India). The pie chart represents the collection in various years from 2002-03 to 2009-10.

430. White paper on Black money _opcit.,_ note 30
431. White paper on Black money _opcit.,_ note 30
4. Whether the comparative study of the developed countries like USA, UK, Australia and India will help for solving the issues and complexities of transfer pricing which are occupying increasing space in management minds?

✓ The concept of Transfer pricing is a neutral concept that simply refers to the determination of transfer prices for transactions between associated parties. The term pricing itself is not in itself, illegal or abusive, what is illegal or abusive is transfer mispricing, also known as transfer pricing manipulation or abusive transfer pricing[^132]. The developing countries have a fundamental problem in their distinct lack of comparables data and getting proper comparable data is also very tough and do not tend to reality of the situation. Whereas in developed economies getting the data is not so difficult as when compared to developing economies.

countries. By comparing the developed vs developed much problem of real problem of the Transfer pricing cannot be known. Also by comparison with developed vs developing the exactness where the issues of Transfer mispricing or abusiveness of Transfer pricing can be identified. Even if study the developing vs developing it will not be much help in solving the issue of the basic problems faced by the countries. In the verge of growth of development the multinational enterprises will tending towards zero rate taxation country to establish themselves and getting more profit for capitalistic moments of the Revenue. Much of the problems of poor documentation, lack of detailed FAR analysis, reluctance of the taxpayer all these conditions are reflected more in developing countries rather than developed countries. Apart from this the issue of Transfer pricing of Intangibles, like trademark, patent, its valuation poses a separate environment in developing countries rather than developed countries.

The application of the arm’s length principle often requires that a comparison to be made between the prices charged in controlled transactions, or the financial results of such transactions, and the prices set in or the financial results of similar transactions between independent enterprises in similar circumstances. This comparison is used to determine the whether a transfer pricing adjustment is needed when computing the taxable profit of one or more of the associated enterprises. Comparability is, therefore at the heart of transfer pricing.

Difficulties in accessing and using reliable comparables data may mean that developing countries are unable to effectively apply transfer pricing methods based on comparables and that taxpayers face uncertainties in complying with transfer pricing rules that assume the existence of reliable comparables. The lack of objective data available to tax authorities and taxpayers may result in difficulties in resolving disputes and encourage both to adopt aggressive positions.

The comparability of developed and developing countries made known the fact that the type of difficulties faced by the countries and transfer pricing disputes frequently requires negotiation and compromise. In the absence of reliable comparables data, concerns may arise as to appropriate bases from which negotiations should start. It was also find out that the limited number of sizeable independent companies active in some countries. This appears to be the case in number of developing countries in Eastern Europe and Central Asia as per the data collected by
the World Bank. It is known from the idea of comparison of the developed and developing economies that “Develop rules regarding transfer pricing documentation to enhance transparency for tax administration” A review of the country experiences in evaluating transactions by testing the foreign counterparty may be useful to developing countries.

5. How far the issues of Transfer pricing will contribute to the officers, Taxpayers and tax professionals who are facing stiff challenge to solve the problems on Transfer pricing?

Tax administration of developed and developing countries are much relied on the expertise of the professionals who are in field to solve various intricacies of Transfer pricing problems. To name them Price water coopers, KPMG, Deloitte Haskins and Sells etc., the issues which has been discussed like comparative analysis of MNCs/MNEs methodologies of Transfer pricing systems, behavior aspects of MNEs and study of the case laws of the Indian and International case laws of the countries like UK USA, Australia will have a long effect in arriving the various issues how far the effects were centralized in the developed countries and how the issues were viewed in developing countries, how far the treatment by the developed nations wherein the MNEs are having permanent establishment and having subsidiaries in developing countries, which are the method to be followed and what circumstances it has to be applied, which method will have edge over other methods and in which country the Transfer pricing issues were crystallized the type of methods followed and how far the revenue of the country is protected and safe all these gives full glimpse to the tax professionals, and it is a research guide tool to the further researchers who are in the field of developing the issues, practicing, and also to the Educators Research scholars.

6. What are the motives for multinational corporations to engage in transfer pricing manipulation?

✓ Different taxation regulations in various countries offer opportunities for multinational corporations to reduce taxes and tariffs. Through the process of manipulations the multinational corporations can shift profit artificially from a high-tax jurisdiction to a low tax jurisdiction and thereby a present a better financial performance. Many multinational corporations operate successfully
around the world. They pay are paying little or even no local corporate tax at all. Multinational corporations profit-shifting mechanism through transfer pricing manipulation. The study of the cases like Forest Laboratories Inc. Case (The Double Irish) Apple case, Caterpillar case, and SABMiller Case reveals the fact that the profit maximization goal of each profit center made the MNCs to manipulate the Transfer pricing norms. The above four cases discussed in the theses shows the planning via regulatory arbitrage, especially via shifting profits between high and low tax jurisdictions by using transfer pricing strategies and by taking different tax regulations. These four corporations established offshore subsidiaries and claimed these offshore subsidiaries claimed to be the corporations tax residence or in charge of the intangible assets such as trademarks, patents and other intellectual properties. In order to avoid or evade corporate taxation, four multinational corporation successfully shifted their pre-tax global income through their offshore subsidiaries by maximizing those foreign subsidiaries profits either through patents, licensing fees or managements fees. Also it known factor that the disadvantages of the arm’s length principle make it possible for corporations to shift profits to tax havens by mispricing the intangibles during the transactions. OECD has acknowledged that, today the arm’s length principle by itself might not be enough and further revision of the regulations need to be done. For example regulations related to definition of intangibles, regulations concerning the allocation of the profits from intangibles not being divorced from the value creation of the assets etc. this is an important factor contributed for corporations motivation to engage in transfer pricing manipulation for tax purposes.

7. What is the role of Indian courts in accepting the norms of Transfer pricing methodologies framed by OECD, UN Model Tax Convention?

✓ As the subject of Transfer pricing is still nascent to Indian situation there are few handful cases, were developed by the courts and tribunals since the law of transfer pricing evolved very recently. Both Revenue and Taxpayers largely depended on OECD Guidelines and CBDT instructions and circulars: and issues were hardly agitated beyond first appellant level. In the initial years Revenue approach was very aggressive as Transfer pricing cases contributed major part of tax collections. To remove ambiguity the courts in many cases as discussed in Chapter VII of this thesis reveals the information certain case laws have helped the Taxpayers and
Tax administration in the interpretation of the rules. But there are no good cases of having the precedents which can be made use for subsequent followers to assess the real implications of the Transfer pricing issues. For a number of reasons the meaning of the arm’s length standard is largely uncertain because of the absence of case law with public good features in this area. The crisis of arm’s length standard started its wave during the transfer pricing litigation which has emerged in both the developed and developing world since the beginning of the 21st century the example of Glaxo SmithKline wherein a British pharmaceutical giant, filed suit against the US Internal Revenue Service early in 2004 with US $5 billion at stage the largest transfer pricing litigation in world history began.\textsuperscript{433} In India much of the cases namely wherein certain issues discussed are Morgan Stanley & Co. v. DIT, the issue of whether further income attributable to service PE when the company was remunerated on arm’s length basis was discussed. In other cases like Sony India (p) Ltd v CBDT, SGS India Pvt. V ACIT, etc whereas issues were discussed and courts substantiated with certain reasoning. But there are no cases as to \textit{stare decisis} for precedents to be followed. The norms and rules proposed by the OECD/UN model tax convention has been accepted by the main countries. Though India is not a member to the OECD it is following the principles and rules enshrined for the purpose of Arm’s length purpose. OECD has been continuously working to develop an approach which may be acceptable to tax administrations of member countries and others in dealing with different aspects of transfer pricing. The wordings of the OECD 2010 can be a “at policy level, the countries need to reconcile their legitimate right to tax the profits of a taxpayer based on income expense that can reasonably be considered to arise within their territory with need to avoid the taxation of same item of income by more than one tax jurisdiction. Such double or multiple taxation can create an impediment to cross-border transactions in goods and services and movement of capital”. The principles are guidelines.

\textbf{8. Whether the methods and principle issues framed in the Arm’s length principle will efficiently handle the issues of transfer pricing and provide a

\textsuperscript{433} Martin Sullivan “With Billions at Stake, Glaxo puts US APA program on Trial” Tax Notes International (2004) p 456
reasonable solution for allocating revenue to the concerned taxation jurisdictions and lucid environment to the Taxpayer?

The methods/principles enshrined in the Arm’s length standard are of good old principles, Article 9 paragraph 1 of OECD Model Tax Convention has an authoritative statement of the arm’s length principle which form the basis of bilateral tax treaties involving the OECD member countries and an increasing number of non-member countries. The arm’s length principle follows the approach of treating the members of an MNE group as operating as separate entities rather than as inseparable parts of the single unified business. Separate entity approach treats the member of an MNE group as if they were independent entities, attention is focused on the nature of transactions between those members. On observation it is evident that the transfer pricing methods proposed are merely suggestions, and originally transfer pricing rules from OECD were put into place to protect business from double taxation and encourage cross-border trade and the transactions between those members obtained in comparable uncontrolled transactions which is referred to as a “comparability analysis” is at the heart of the application of arm’s length principle. The idea purpose of this legislative outline was to allow elimination of tension between high-tax and low-tax jurisdictions. Many OECD and non-OECD countries suffer in the same way from the artificial shifting of profit to low tax jurisdictions. This principle is not viewed by all governmental bodies as the only method of transfer pricing. In fact this transfer pricing legislation is not sufficient to resolve all the international tax issues that may arise for a country. While transfer pricing legislation is part of the measures needed to tackle international tax avoidance, it does not replace anti-abuse rules and/or controlled for foreign companies legislation that may be needed to fight abusive transactions. On detailed verification through various cases laws and procedures facts and figures, following of the OECD methodologies to certain extent the arm’s length method was bit overburdening for those countries with limited resources. These principles may appear to be complex and resource intensive, which many developing countries do not have. By this it is also known

434. OECD Transfer pricing legislation – A suggested Approach (June 2011)
435. OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (July 2010)
436. ibid
437. ibid
438. ibid
many governmental bodies have legislation directing procedures for arm’s length method based on the OECD rules and regulations. Most countries practice arm’s length method, but the formulary (Formulary) apportionment is a very common practice in the United States. In practical provision in the domestic legislation do not prevent tax administration from granting a corresponding downward adjustment under the terms of double taxation treaty. This reflects the position taken in the transfer pricing legislation of the many countries\textsuperscript{439} In the above circumstances it is understood that Arm’s length principle is not only the solution for all transfer pricing issues there exists alternative also to the Tax payer.

9. **Whether Global Formulary Apportionment: a valid alternative to the Arm’s length Principle? If so what is the position of India in implementing the concept of Global Formulary apportionment?**

As discussed in Ch-VI and Ch-VII and also to the Findings to the Q.No. 8 it is well known that the circumstances of the countries can be protected by adopting the principles of Formulary apportionment system to certain extent only. Because the formulary apportionment system pre-requisites is it is based on predetermined formula that disregards individual facts and circumstances. To certain extent it apparatus on an arbitrary fashion. It is also still under debate that Formulary apportionment would protect against double taxation while ensuring the single taxation.\textsuperscript{440} For formulary apportionment to succeed internationally, a significant international coordination and consensus would be necessary. All countries would have to agree on a predetermined formula and on all the factors contained within. This would be very difficult to obstacle to overcome. Every country has unique accounting the tax rules which regulate definition of income as well as deductions for everything from interest to depreciation to pension contribution. These rules reflect the political economic climate of each country. In order to work for formulary apportionment the tax accounting rules of each country would need to be standardized in order to arrive at a uniform definition of the taxable base subject to apportionment. To achieve this goal and maintain sovereignty of country is very difficult. In a situation and country like India, which has become a hub for the service industry, many IT, pharmaceutical and financial services multinational companies have located

\textsuperscript{439} OECD: Transfer Pricing Legislation: A suggested Approach (June 2011) Annex Exploratory notes
\textsuperscript{440} US Transfer pricing Guide 110.20 “Formulary Apportionment vs. Arm’s length Standard” Kluwer publication 2012 p 781
research and labor-intensive operations in India to take advantage of cheaper labor and local technology. Such activities are controlled from external locations and multinationals provide global advice and infrastructure in return for service agreements and royalty charges. The cultural and social background of Indian system may not be possible to the fullest extent to implement the Formulary apportionment. In such a situation the author of this thesis opines that the golden rule of mediation of Advance price agreement and the principle of Adaptability of Arm’s length principle, wherever the comparables are available can be adopted. When there is no comparables the system of Formulary apportionment can be applied is the solution to the present day problem of Transfer pricing.

In a situation and country like India wherein huge economic cultural social differences exists thorough the nation. Also political and socialistic background wherein much scope is for labour oriented mixed economy, formulary apportionment system in the fullest sense is not possible at all. *In such situation the author of this theses opines that the golden rule of mediation of APA (Advance pricing Agreement) and the principle of adaptability of Arm’s length principle whenever the comparables are available can be adopted. When there is no comparables the system of Formulary apportionment can be applied is the solution in the present day world. The principle of Global Formulary apportionment application has been accepted the Indian Tribunal in case by name Ericsson Radio System AB (Ericsson) Motorola Inc (Motorola) and Nokia Network OY (Nokia)⁴⁴¹ here the question of Permanent Establishment was discussed. The facts of the case is Ericsson neither had business connection nor permanent establishment (PE) within the meaning of Sweden –India DTAA and hence no income attributable to India. Motorola had a business connection though its activities fell within the meaning of USA-India DTAA hence no income attributable to tax in the case of Nokia Finland had business connection and PE in India within the meaning of Finland-India DTAA. The Income Appellate Tribunal while deciding on the extent of attribution to a PE, took into consideration the fact that economically significant functions such as R&D and manufacturing had not been performed by PE as these activities had taken place wholly outside India. *In this issue The Tribunal did not apply transfer pricing methods for determination of arm's length prices. But it adopted a formulary apportionment approach which is in

⁴⁴¹. Motorola Inc vs. DCIT (2005)96 TTJ1
practice in USA Canada Switzerland and other countries. Here is the first time the Indian Tribunal started the opening for applying the principle of Formulary apportionment method and started with worldwide net profit margin of the enterprise and applied the margin to the total revenues earned by the enterprise from India. The resultant figure was deemed to be the net profit arising from Indian activities.

Inference: though this approach has provided a practical solution to resolve difficult attribution issues yet was not consistent with arm’s length pricing methods. But the Tribunal has made it a point that in case of non-existence of arm’s length principle the utilization of Formulary apportionment method can be adopted.

10. Whether the Tax avoidance behavior of the Multinational corporations be justified as legitimate problem?

As discussed in Q No 6 of the Research findings it is made known that the motive of the Multinationals in achieving their profit maximization has proved the MNCs crossed the barrier of Legitimacy theory which stresses that an organization should consider “the rights of the public at large, not merely those of its investors”\textsuperscript{442} the organizations are not considered to have an inherent right towards resources and they need to earn this right\textsuperscript{443} in view of the above depending on the circumstances the issue of tax avoidance wherein it draws grey area of legal and illegal if there is huge loss to the society by way of tax avoidance it cannot be accepted as legitimate in the interest of the society at large. To remember the words “Legal systems often strive for consistency whereas societal norms and expectations can be contradictory”\textsuperscript{444}.

11. Whether the proposed Transfer pricing guidelines control the manipulation by the MNE group resulting abusive tax avoidance?

Upon studying the case laws like Caterpillar, SABMiller the idea of fine line between the tax avoidance and tax evasion a distinction can be drawn. The way of tax planning by multinational corporations which causes huge cut on the government’s tax revenue causes countries are losing billions of dollars annually in tax collection. The data collection of developing countries shows that “Developing countries lose

\textsuperscript{443} Ibid , p 325
\textsuperscript{444} Ibid p. 328
almost three times more to tax havens than all the aid they receive each year\(^{445}\) the Aggressive Tax schemes aiming at dodging tax in developing countries bring even more serious issues. Transfer pricing regulations monitors the behavior of MNCs tax avoidance which is not illegal but the tax avoidance behavior which breaches the implicit terms of social contract there are no regulations. The case laws like Starbucks corporations, Apple Inc, Forest Laboratories and SABMiller reveals the true story of Tax avoidance behavior to the society that is breach of implicit terms of social contract but legally they have not violated anything under the umbrella of tax avoidance they have capitalized the resources. On this area there are no comprehensive rules and regulations, which OECD has to cater to the needs especially from the angles of the developing countries and check the erosion of the revenue to the country. Also the concept of tax avoidance which is always in the grey area of legitimacy and illegitimacy has to be redefined from the angle of erosion of revenue to the country in which the countries has experienced (both developed and developing economies).

8.02. **Findings and Suggestions of the Research**

Based on the Research question evolved, hypotheses framed and conclusions drawn in the foregoing chapters of this work the following findings are arrived at. Based on these findings the corresponding suggestions are also made. The suggestions are submitted for the considerations of policy makers, stakeholders, academicians, Taxpayers, Tax Practioners, and Tax burocrates and also the judicial systems which are prevailing in the present condition in developed economies and developing economies with reference to India.

<table>
<thead>
<tr>
<th>SI No.</th>
<th>Findings</th>
<th>Suggestions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>The present Transfer pricing legislation on Intangible assets lacks the clear-cut guidelines as per the prevailing rules in the developing countries the Transfer pricing Guidelines framed are so complex and even the tax administrations of the developing countries like India must make full use of the guidelines recommended by the OECD for Intangible assets for the purpose of effectively deciding the Transfer pricing issues</td>
<td></td>
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</tbody>
</table>

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>Economic development and public interest are two sides of the coin which can be achieved with good legislation in the field of taxation and the process needs the understanding of the sovereignty, integrity of the foreign individual/national who is residing in India in the status of Non-resident.</td>
<td>This can be achieved by accepting the principle of mutual cooperation between the two sovereign country and respecting the sovereign integrity, development, since majority of the MNEs/MNCs are foreign nationals</td>
</tr>
<tr>
<td>3</td>
<td>To give good justice to the Tax payer one has to follow the cardinal principles of Natural Law. In this regard the concept of DRP (dispute Resolution panel) has been initiated and even the rights of appeal to the individual Tax payer has been granted DRP has came with effect from 01st July 2012. the constitution of the DRP lacks a member from the economic field</td>
<td>DRP at least should have one independent member who is an economist should hold independent charge without any interference wherein the principle of natural justice likeaudialterrmpartem can be followed</td>
</tr>
<tr>
<td>4</td>
<td>Finding a proper comparable data is very difficult in any given sector. Even if the information is available, the comparable information in developing countries may be incomplete and also in a form very difficult to analyze as the resource and process are not available</td>
<td>Making availability of the region wise data for the purpose of comparative analysis. This process can be done opening the data bank or data center at regional level, state level, national level for the purpose of finding out the accessibility of data for comparative analysis</td>
</tr>
<tr>
<td>5</td>
<td>In most of the cases information about independent enterprises may not exist at all as the same is required for comparative analysis. In certain time the available data always tend to focus the situation, conditions of the developed country and the cost is also exorbitant due to which accessibility is very difficult.</td>
<td>To solve this problem the Multinational Enterprises find a suitable person who donates fund for the purpose of data storage and utilization by MNEs/MNCs</td>
</tr>
<tr>
<td>6</td>
<td>In case of newly operated or opened technologies there are no comparables are available at all. Due to which the firm/organization that have just opened up or in the</td>
<td>In such situation the MNEs try to understand cooperate and mutual agreement to share the available data among themselves. Mutual cooperation is the sina-qua-non for such type of</td>
</tr>
</tbody>
</table>

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| 7 | The process of Transfer pricing methods is complex and time-consuming, which requires most skilled and valuable human resources in both Multinational Enterprises and Tax administrations. As evidenced in the case of SABmiller club beer of UK wherein huge loss to the Government of UK by the MNEs were detected by this process of transfer pricing manipulation noticed | OECD who has shouldered the responsibility of catering to the needs of Developed and developing countries should open training center to educate the MNEs both at developed and developing countries as the problem of Transfer pricing pertains to both. These training centers must be updated with resource person and who are well technically capable of handling situations. The remunerations may be collected from the MNEs of both developed and developing countries. |
| 08 | In the process of cooperation there is discrimination followed by the MNEs of developed countries in congruence with developing countries. Also supplying the materials databases etc., developed countries shows some sort of reluctance towards developing countries. | The convention of OECD/UN model tax convention under Art. 24(1) states that there should not be any discrimination while allocating the materials like data resources, treatment of the residents non residents etc., this has to be followed both in principle and practice. Otherwise the concerned state administration has to look into the penalty provisions of the taxation statutes. |
| 09 | The biggest hurdle in Transfer pricing is the expensive database and associated expertise to handle data and costly tasks which poses main threats to developing countries particularly it will hit the small and medium sized enterprises (SMEs) | To solve this problem the OECD should provide the technical assistance by way of opening the training center to educate the MNEs providing resource person, conducting the seminars symposiums at region level and the training programmes should be on par with developed and developing countries |
| 10 | The various other issues like technical expertise, audit programme, procedural requirements causes conflicting interpretation while solving the problem of Transfer pricing issues in both developed and developing countries | This can be addressed by the proper training programmed conducted by the OECD organizations, by way of updating the knowledge through various mechanisms and making mandatory on the part of the MNEs and State Administrations to attend the training programmes mandatorily failing which |
OECD has to arrange separate toolkit and guidance program me for developing nations for their convenience and training materials for their understanding in the area of application of the principles of transfer pricing.

| 11 | The growth of recent technologies like E-commerce-economy changed the world by way of exchanging information and business concepts resulted in relooking of physical definition of long defined traditional taxation concepts like amazon.com, flip car, e-bay deliveries etc., |
| 12 | On observation of the case laws of the various Tribunals, courts, and higher judiciaries it is observed that there are no precedents or judicial determination at the level of Supreme court and also at the International level also |

Adaptability is the *sine-qua –non*. Law has to change with the phase of society. The present day concept of e-commerce, e-bay etc has to be viewed in the newer dimensions of the definition and the valuation has to be made with new concepts of both intangible nature of property and the suitable modification in the adaptability has to be made.

Courts are unable to produce the good feature because of transfer pricing litigation also because of the non availability of good comparables and also weak rule of law and political instability produce frequent violation of *stare decisis*. For the same reason the taxation of the some of the Nations like USA, Canada Switzerland using other method other than Arm’s length principle like Transactional profit method s like Formulary apportionment method of Transfer pricing but the same is not backed by the OECD though initially rejected by the OECD but more recently OECD Guidelines guarded support to GFA accepted by the OECD in the initially but later the same was followed by the OECD

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447 Para 3.1 of OECD Guidelines
448 OECD discussion draft to permanent establishment para 3 of 2003 gives guidance on how to apply the profit split method in accordance with the arm’s length principle, with particular reference to the multifactor formula approach
The MNCs/MNEs which are utilizing the concept of Tax avoidance by way of manipulation of Transfer pricing or transfer mispricing resulted the cases of SABMiller, Starbucks Corporation, The Apple etc.,

The concept of Tax avoidance /transfer mispricing which were utilized by the MNCs/MNEs has to be redefined with limitation. Otherwise there is no limit to the tax avoidance which causes the Tax erosion to the nation. There should be maximum limit for the concept of Tax avoidance barring which the excess amount has to be treated as Tax Evasion.

8.03. Future extensions of this research

Laws and regulations have flaws and are not perfect. But what makes laws and regulations powerful is their ability to successfully enforce, regulate and penalize those who choose to break them. Most laws have been broken at one point or another and they will continue to be broken for as long as this world exists. Transfer pricing regulations are no different. The loopholes of the current system are exploited by corporations for financial benefits. The government needs to implement a regulations or lower corporate tax rates to deter companies from allocating profits to lower tax jurisdictions. In this set of Transfer pricing valuation, the determination of the value of the intangible property transactions will always be difficult to assess the perfectness. However, regulations of these sales are to ensure intangible property is being shifted for the right reasons. Along with the valuation of intangible property, the arm’s length standard has been at the core of debates concerning current transfer pricing problems. The ambiguity and complexity of regulations of the arm’s length standard is the fundamental flaw. There is no arm’s length proof or evidence in related party transactions because comparables simply do not exist. Even the new system like formulary apportionment also will not solve the transfer pricing problems to much extent. The United States transfer pricing system can only be enforceable if it reasonable and understood by taxpaying corporations and judges. In this context rather than developing new laws and regulations, the government should continue with the arm’s length standard but clarify ambiguities and formulate a better plan to enforce regulations. Arm’s Length Principle which acquired the unique status of peremptory norm has suffered from several operational and conceptual shortcomings, resulting using of the OECD transfer pricing guidelines as a default legal regime enforceable via bilateral or multilateral advance pricing agreements (APAs) only.
The APA procedure shall be governed by article 25 of the Advance price agreements concept according which the competent authorities, if the person accepts the APA concluded by the competent authorities, the APA will be final and not subject to further administrative or judicial review. By and large the system which we can think is if a given taxpayer is not happy with the rules of ALS (Arm’s length principle) the tax payer request to be governed by either OECD guidelines implemented via a bilateral or multilateral APAs only.

The existing system of accepting the use of publicly quoted commodity prices (herein after called Sixth method”) and its impactness and effectiveness with arm’s length principle could be prepared. There are other alternatives in addition to arm’s length principle which is written and approved by the OECD. The next possible alternative under the OECD Guidelines is the Transactional Net Margin Method (TNMM). This TNMM requires a tougher comparability test than the US comparable Profit method which is good because CPM has proven to be the most main palpable of the current methods. OECD TNMM cannot be applied in many cases in which CPM is used in the U. S 449. the methods which have been studied could be adopted for nations and government to maneuver through the legal minefield that is a governing body and craft a viable solution to the problems transfer pricing presents in many circumstances.

8.04. Specific Recommendations

- Arm’s Length Principle which acquired the unique status of peremptory norm has suffered from several operational and conceptual shortcomings resulting using of the OECD transfer pricing guidelines as a default legal regime enforceable via bilateral or multilateral advance pricing agreements (APAs) only. The APA procedure shall be governed by article 25 of the Advance price agreements concept according to the competent authorities, if the person accepts the APA concluded by the competent authorities, the APA will be final and not subject to further administrative or judicial review. In this situation when the Taxpayer finds difficulty to get the comparable he can opt for APA so that even after the availability of comparables the same cannot be reversed.

By and large the system which we can think is if a given taxpayer is not happy with the rules of ALS (Arm’s length principle) the taxpayer request to be governed by either OECD guidelines implemented via bilateral or multilateral APAs only. The existing system of accepting the use of publicly quoted commodity prices (herein after called Sixth method”) and its impact and effectiveness with arm’s length principle could be prepared.

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It is clearly stated there is no one preferred method. The change needs to be implemented with OECD and its member countries to adapt to the change in law and society.

In general the system of CCCTB adopted by the European commission is meant to take account of both the supply and the demand side on generation of company’s income. It is important to note that Formulary apportionment transforms corporate income tax into an implicit tax on the factors used in the formula the apportionment factor is easy to observe, difficult to manipulate and acts as a good proxy for the place where income is generated.

The most pressing transfer pricing problems involve cross-border transactions however, and a single jurisdiction model is not realistic in an international context. With multiple national jurisdictions legitimately seeking a slice of that tax pie, no one formula can possibly command universal respect. In such situation the author of this theses opines that the golden rule of mediation of APA (Advance pricing

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450. Ibid.
Agreement) and the principle of adaptability of Arm’s length principle whenever the comparables are available can be adopted. When there is no comparables the system of Formulary apportionment can be applied is the solution in the present day world. The principle of Global Formulary apportionment application has been accepted the Indian Tribunal in case by name Ericsson Radio System AB (Ericsson) Motorola Inc (Motorola) and Nokia Network OY (Nokia).452

- Finally to remember the words of Arnold McDonnell who call for more harmonious view which state that “the arm’s length principle and formulary apportionment should not be seen as polar extremes rather, they should be viewed as a part of the continuum methods ranging from CUP to predetermined formulae. From this it clear that where the arm’s length principle stops and where the formulary apportionment begins, in such a situation harmonizing the both principles will be the solution for the future world. The inference can be drawn that wherever the comparables are available the arm’s length holds good wherever the comparables are not available the principle of Formulary apportionment can be utilized.453 This principle of golden mean is the solution for the dichotomy of Arm’s length principle along with this Tax payer and Tax Administrators are to be trained with the idea of mutual co-operation is the sine-qua –non for the present world.

452. Motorola Inc vs. DCIT (2005) 96 TTJ1