



## **Transfer Pricing Alert** Delivering Clarity

### **CBDT releases internal instruction on appropriate use of Country-by-Country reports in India**

**Issue no:** TP/03/2018

**In this issue:**

[Background](#)

[Detailed discussion on the instruction providing guidance on appropriate use of CbCR in India](#)

[Key takeaways](#)

[Annexure](#)

[Deloitte tax@hand App](#)

[Do you know about Dbriefs?](#)

## Background

The emergence of globalization had provided international groups an opportunity to lessen their tax liabilities by artificially shifting their profits to low /no tax jurisdictions. In order to address this issue and enhance the coherence in international tax rules, the OECD along with G20 countries devised a 15-point Action Plan under the Base Erosion & Profit Shifting (BEPS) project. Action Plan 13 of the BEPS project contained revised standards for transfer pricing documentation and recommended a three-tier standardized approach.

In keeping with India's commitment to implement the recommendations of BEPS Action 13, India introduced the Country-by-Country Report (CbCR) and Master File regime in the Indian Income-tax Act, 1961 (the Act) through the Finance Act 2016 (i.e. by inserting new section 286 and introducing relevant provisions under section 92D), effective from 1 April 2016.

As per Action 13 guidance, the CbCR is to be filed in the jurisdiction of tax residence of the ultimate parent entity of the international group (IG) and the parent jurisdiction will share the report with other jurisdictions where the IG operates, through an automatic exchange mechanism. India has also adopted an approach in line with the Action 13 guidance.

In order to facilitate the automatic exchange of CbCR, India has been a signatory to the multilateral competent authority agreement for automatic exchange of country-by-country reports (MCAA), through which India will exchange and receive CbCR for FY 2016-17 onwards (i.e. the first year of the CbCR in India).

The Central Board of Direct Taxes (CBDT) acknowledges that some countries would not have signed and/or ratified the MCAA yet. For such cases, the instruction clarifies that India would attempt to enter into Bilateral Competent Authority Agreements (BCAA) for automatic exchange of CbCR with such countries on the basis of its tax treaties or its Tax Information Exchange Agreement. This would specifically be critical for IG's headquartered in countries such as US and China.

Further, pursuant to the end of the first year of Action 13 implementation in India, taxpayers have raised concerns on how the CbCR information would be used by the tax authorities in India. CBDT's recent instruction no. 02/2018 dated 27 June 2018 relating to appropriate use of CbCR information in India is a positive step towards addressing some of taxpayers' concerns, as this instruction provides clarity on certain fundamental aspects of use of such information by the Indian tax authorities.

We have discussed in detail the salient features of the instruction in the following section of this alert.

## Detailed discussion on the instruction providing guidance on appropriate use of CbCR in India

### 1. Access to CbCR:

- 1.1. Access to the CbCR filed in India as well as the CbCR exchanged by other jurisdictions with India will be restricted to certain specified senior authorities. These reports shall be primarily accessed by the Competent Authority of India [Joint Secretary, FT & TR-1 and Joint Secretary, FT & TR-II in CBDT] and Director General of Income-tax [Risk Assessment] (DGRA), in accordance with the provisions of the tax treaties and the Act, respectively.

- 1.2. Pursuant to selection of the case of a constituent entity for scrutiny, based on risk assessment by the Centralised Risk Assessment Unit (CRAU) of DGRA, the jurisdictional Transfer Pricing Officer (TPO) will have access to the information relating to that constituent entity.
- 1.3 The CRAU of DGRA will formulate the standard operating procedures for the TPO.

## 2. Appropriate use of CbCR:

- 2.1. The instruction provides a framework for the appropriate use of the CbCR information by the TPOs during the transfer pricing audit (which is aligned to a large extent to BEPS Action 13 guidance). We have discussed this in detail below:

- High level transfer pricing risk assessment:

CRAU's risk based assessment could provide insights on potential risk on the transfer pricing arrangements, which may necessitate further examination by the TPO. For this purpose, a tax audit could be planned by selecting the case for scrutiny. Using the CbCR information as a basis, during the course of the transfer pricing audit, the TPO is empowered to undertake the following:

- make further enquiries on the transfer pricing arrangements of the taxpayer;
- make enquiries into tax matters identified using other data sources or arising during the course of a tax audit.

The instruction clarifies that the queries raised by the TPO need not be restricted only to the potential risks earlier identified by the CRAU (thus providing the TPO's with a broader purview for audit).

Further, the instruction assures that the CbCR information would not be used as the only material considered to propose transfer pricing adjustment. These adjustments need to be made in accordance with the Indian transfer pricing regulations.

- Assessment of other BEPS related risks:

The CbCR information could be used to identify indicators of possible tax risks unrelated to transfer pricing (such as hybrid entities, hybrid financial instruments, conduit companies, resorting to profit shifting using the contractual allocation of risk, pricing of intangibles, etc.). Further enquiries could be raised to examine and analyse such risk for the purpose of concluding on potential tax risk of BEPS. However, the instruction clarifies that CbCR information cannot constitute conclusive evidence that an IG is engaged in other forms of BEPS activities.

- Economical and statistical analysis:

In order to understand the benefits, use and risk of CbCR and tax system, the instruction states that the information obtained through the CbCR may be used for economical and statistical analysis, which is consistent with provisions of the tax treaties.

## 3. Inappropriate use of CbCR information:

Use of CbCR information would be considered as "inappropriate use" in the following circumstances:

- If the information is **used as a substitute** for a detailed transfer pricing analysis of international transactions and determination of arm's length price; and
- If the information is used as the **only piece of material** to propose a transfer pricing adjustment.

#### **4. Safeguarding the confidentiality of the CbCR:**

- 4.1. The CBDT acknowledges the relevance of safeguarding the confidentiality of information submitted in CbCR as not only a legal requirement under the provisions of tax treaties, but also an international obligation. Any breach of information may have serious implication on India's ability to receive information from other jurisdictions in the future.

Thus, the instruction assures that the CbCR received from other jurisdictions will conform to the requirements of confidentiality under the tax treaties. Similarly, CbCR filed in India will abide by confidentiality provisions of the Act.

- 4.2. Additionally, the CBDT instructs the specified senior tax authorities to ensure that field tax officers handling the CbCR (exchanged under the tax treaties) should strictly maintain the confidentiality of the CbCR as per the detailed guidelines provided in Chapter-VII of Manual on Exchange of Information.

#### **5. Monitoring, control and review the use of information:**

- 5.1. The use of information by TPO in tax audits will be monitored by jurisdictional CIT (Transfer Pricing). Any breach of appropriate use of CbCR information would be brought to the notice of the Competent Authority of India, who would be committed to disclose such breaches to the OECD's Coordinating Body Secretariat.
- 5.2. In order to regularly review the appropriate use conditions, the Competent Authority of India requires quarterly filing of consolidated report by the Principal CIT (International Taxation & Transfer Pricing) in the format specified (provided in annexure), commencing from 1 January 2019.
- 5.3. The instruction also empowers taxpayers to raise concerns over breach of appropriate use conditions to the jurisdictional CIT (Transfer Pricing), and if unresolved by the CIT, escalated to the Competent Authority of India.
- 5.4. Any adjustments made to the income of taxpayer based on inappropriate use of the information in the CbCR, will be promptly conceded by the Competent Authority of India in Mutual Agreement Procedure (MAP) proceedings.

#### **6. Key open issues**

The instruction broadly addresses many of the taxpayer's concerns. However, more information/clarification on some of the below key points would be welcome:

- Parameters for the risk based assessment, subsequent to which the CbCR information would be shared with the TPO, to educate taxpayers for the reasons for selection.
- Time and manner for resolving taxpayers' concerns on breach of appropriate use conditions could provide some comfort to the taxpayers.
- Procedure (including timelines) to be followed by the Competent Authority in MAP proceedings in relation to adjustment made based on inappropriate use of the CbCR information would be useful to know.
- Details regarding who would be conducting the assessment of other BEPS related risks of the CbCR information and also who would have the authority to undertake economic and statistical analysis of the CbCR information. Also it would be helpful to know the mechanism that will be adopted to undertake the above assessment/analysis. Further, information on who would conduct tax audit and make further enquiries into identified potential tax risk (unrelated to transfer pricing) and how the CbCR information would be shared with the relevant Tax Officer.

- Whether the TPO will have access to the CbCR information in relation to the cases, which have been selected for transfer pricing scrutiny audit under the regular risk based assessment.

## Key takeaways

The CBDT's internal instruction is indeed a positive step towards addressing taxpayers' concerns in relation to the information submitted in the CbCR. However, more information/clarification on some of the above highlighted critical aspects would really be appreciated. It would be interesting to watch how these instructions are practically implemented and enforced by Indian tax authorities. Given the wide ranging use of the CbCR information, from a readiness perspective, taxpayers could endeavour to undertake a proactive risk assessment for queries likely to be raised by the Indian tax authorities.

## Annexure

### Quarterly report of review of appropriate use of country-by-country reports

S.No.	Name of the Indian taxpayer	Name of the international group	Country of residence of ultimate parent entity	Country in which the CbCR has been filed	Name & designation of the TPO	Name of the Jurisdictional CIT (Transfer Pricing)	Whether there has been appropriate use of the CbCR? Yes/No	If no, details of inappropriate use as per CIT (Transfer Pricing)	Remarks of Principal CCIT (IT & TP)

## Deloitte tax@hand App

### Current. Comprehensive. Convenient.

Download [tax@hand](#) app, a secure digital platform for timely global and regional news, perspectives, and resources. Do visit the tax@hand webpage [here](#).



**Deloitte.**

#### IOS

Download from App Store

#### Android

Download from Google Play

#### Website

Add to favorites

## Do you know about Dbriefs?

Dbriefs are live webcasts that give valuable insights on important developments affecting your business. To register, visit the [Dbriefs](#) page.



**Download the report**





Deloitte makes an impact that matters

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee, and its network of member firms, each of which is Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee ("DTTL"), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as "Deloitte Global") does not provide services to clients. Please see [www.deloitte.com/about](http://www.deloitte.com/about) for a more detailed description of DTTL and its member firms.

This material and the information contained herein prepared by Deloitte Touche Tohmatsu India LLP (DTTI LLP) is intended to provide general information on a particular subject or subjects and is not an exhaustive treatment of such subject(s). This material contains information sourced from third party sites (external sites).

DTTI LLP is not responsible for any loss whatsoever caused due to reliance placed on information sourced from such external sites. None of DTTI LLP, Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the "Deloitte Network") is, by means of this material, rendering professional advice or services. This information is not intended to be relied upon as the sole basis for any decision which may affect you or your business. Before making any decision or taking any action that might affect your personal finances or business, you should consult a qualified professional adviser.

No entity in the Deloitte Network shall be responsible for any loss whatsoever sustained by any person who relies on this material.

©2018 Deloitte Touche Tohmatsu India LLP. Member of Deloitte Touche Tohmatsu Limited