

## Tax Experts react to CBDT's guidance on appropriate use of CbC Reports

Jun 29, 2018

CBDT issued [Instruction No 2/2018](#) providing guidelines for appropriate use of CbC Reports. The Instruction also addresses concerns around confidentiality of information as well as outlines the process for monitoring, control and review of appropriate use.

The Who's Who of the Tax World reacts to "CBDT's guidance on appropriate use of CbC Reports".

### Rahul Mitra (Partner, Dhruva Advisors LLP)



The Indian Revenue Board has released the guidelines on appropriate use of Country by Country (CbC) reports, filed by taxpayers, which would come to the access of Tax Authorities of the country. The guidelines are extremely welcome, as providing necessary sanction upon Tax Authorities to ensure that the information available with them are used in a most effective manner; and at the same time, not misused in any manner, to the detriment of taxpayers, whether or not Indian or foreign MNCs.

The guidelines mention about the relevant wing of the Indian Revenue, namely Centralised Risk Assessment Unit (CRAU), being responsible for coming up with risk evaluation mechanism of the CbC report, vis-a-vis picking up of cases for scrutiny assessment; and also providing necessary SOPs to jurisdictional transfer pricing officers to conduct the assessments in a meaningful and effective manner.

It is understood that information emanating out of CbC reports may not only be used for conducting transfer pricing assessments, but also for evaluating whether or not other aspects of BEPS have been breached.

The Indian Revenue Board has allayed fears of taxpayers to ensure that field officers would maintain necessary confidentiality of the information gathered from CbC reports, through proper monitoring of action of field officers by superior officials of the Tax administration. The guidelines also bestow taxpayers with the opportunity to escalate possible misuse of information gathered from CbC reports by the field officers, to Commissioners, with necessary avenue available for the Competent Authority to be involved to resolve any such dispute, including through settlement of adjustments through bilateral MAP.

Overall, it has been an extremely positive move on the part of the Indian Revenue Board to instil necessary safeguards within the system of tax administration to ensure that the mammoth exercise of filing CbC reports under BEPS Action 13 is properly respected and carried to its logical conclusion, without creating any impediments or inconveniences to taxpayers.

### Vishweshwar Mudigonda (Partner and Transfer Pricing Leader, Deloitte India)



The Central Board of Direct Taxes ('CBDT') had issued an Instruction 1 to the tax officers on appropriate use of Country-by-Country Report ('CbC Report'). The



instruction issued is in line with the guidelines laid out in the BEPS Action Plan 13 of the Organization for Economic Co-operation and Development ('BEPS Action Plan').

In the Instruction, it is clarified that the TPOs are restricted from the use of critical quantitative information provided by a Multinational Enterprise in its CbC Report only to perform; high level transfer pricing risk assessment, assessment of other BEPS related risks and for economic and statistical analysis for better understanding the use of CbC Report and tax systems. It is also clarified that any conclusion of transfer pricing audit only based on information provided in the CbC Report or use of the information in the CbC Report as a substitute for a detailed transfer pricing analysis is considered as inappropriate use of CbC Report by the TPOs. These specific clarifications provided in the Instruction on the appropriate use of the CbC Report should alleviate the concerns of the taxpayers on TPOs discarding the transfer pricing documentation prepared in support of the arm's length nature of the transfer price and basing the transfer pricing adjustment on the information contained in the CbC Report. However, the execution of the policy intention by the TPOs is yet to be seen.

The clarification on confidentiality, and the measures monitor, control and review the CbC Report information strengthens the confidence of the Multinational Enterprises in submission of the CbC Report with the tax authorities.

*(Views are personal)*

### **Kunj Vaidya (Transfer Pricing Leader, PwC India)**



The guidance on appropriate use of country by country reports released by CBDT is largely adopted from the guidance issued by OECD last year. When CbCR was introduced in India, the major concern revolved around three major aspects – use, confidentiality and adherence;

- 1) **Use** - Can information obtained through CbCR be solely used for proposing transfer pricing adjustments?
- 2) **Confidentiality** – will confidentiality be maintained for all information received through CbCR?
- 3) **Adherence** – action to be taken by the tax authorities to ensure appropriate usage of CbCR information.

The guidance in many ways provides answers to these concerns. The guidance clearly states that the information so obtained shall not be used as the only evidence to propose transfer pricing adjustments.

Given the ability of competent authorities of other jurisdictions to temporarily suspend exchange of CbCR in case of non-compliance with the appropriate use condition, Indian guidance to ensure appropriate measures to monitor and control the use CbCR information was much needed.

By virtue of these recent developments, TP audits in India and disputes arising therefrom are

likely to get more focused and intensive. This is clearly an opportune time for taxpayers to think beyond traditional dispute resolution approaches and opt for alternative dispute resolution mechanisms (particularly bi-lateral) to attain tax certainty.

Overall a much expected and welcome move by CBDT to iron out the concerns in the minds of the taxpayers. All said, fingers crossed on the implementation side of it!

### **Rajendra Nayak (Partner, International Tax Services, Ernst & Young LLP)**



The BEPS Action 13 Report introduced a three-tiered approach to transfer pricing documentation, consisting of a master file, a local file and a country-by-country report (CbC Report) containing certain information relating to the global allocation of the group's income and taxes, together with indicators of the location of economic activity within the group (CbCR information).

The ability of a jurisdiction to obtain and use CbC Reports is conditional upon it using CbCR information appropriately. This condition is described in the Action 13 Report, and is given effect through the model legislation and the model Competent Authority Agreement (CAA). In line with this requirement, CBDT has issued Instruction No. 2/ 2018 dated 27 June 2018 providing guidelines for appropriate use of CbC Reports. The CBDT instruction is broadly in line to the OECD guidance issued in September 2017 and confirms that the appropriate use is restricted to: (1) high level transfer pricing risk assessment; (2) assessment of other BEPS related risks; and (3) economic and statistical analysis, where appropriate. While the CBDT instruction does not define the meaning of "BEPS related risks", the same may need to be understood having regard to the BEPS Action Plan and could include any tax risks that may result in erosion of a country's tax base. The CBDT instruction also confirms that the CbCR information should not be used as a substitute for a detailed transfer pricing analysis or as the only material to propose a transfer pricing adjustment. The Instruction also addresses concerns around confidentiality of information as well as outlines a process for monitoring, control and review of appropriate use.

With the Indian tax administration expressing its commitment to ensuring appropriate use of the CbCR information, the CBDT instruction should pave the way for exchange of CbC Report by other jurisdictions with India.

### **T. P. Ostwal (Senior Partner - T P Ostwal & Associates)**



The guidance given by CBDT on appropriate use of CbCR suggests that it not will be used as a substitute for detailed TP analysis. Therefore, its access should be restricted to Director General Risk Assessment (DGRA) rather than sharing the report with the TPO. DGRA should ascertain risk from CbCR after detailed analysis & give guidance to TPO on specific matters rather than sharing the report with TPO, to maintain confidentiality.

The CBDT guidance suggests that measures of confidentiality should strictly be followed by officers but if the report is leaked by any means, then such officers responsible for the leak should be held accountable. Only if such measures are introduced, ensuring confidentiality is possible, not otherwise, looking at past trends, present practices & credibility.

CBDT also states that adjustments made to the income of the taxpayer based on inappropriate

use of CbCR will be promptly conceded in MAP proceedings. This should also be the approach of conceding matters before CIT(A)/ Tribunal.

### **Manoj Pardasani (Partner and Head – Transfer Pricing, BSR & Co LLP)**



This is indeed a very good initiative by Government of India to announce guidance on use of CbyC Reports. This would help in reducing uncertainty in minds of taxpayers on the manner of usage of information provided as part of CbyC Reports and also suitably help steering the power of tax authorities to use the information under a defined framework. As expected the usage is being linked to identification of the arrangements where there could be a possibility of having an inappropriate transfer pricing policy or framework in place, which results into base erosion or profit shifting.

Predetermined scope of usage of CbyC reports indicates that the information is not only to be used for high level transfer pricing risk assessments, but may also be used for identifying other tax and BEPS related issues, which may have resulted in shifting of profits due to inappropriate practices. In addition to this, the information may also be used for planning a tax audit and as the basis for making further queries during the course of the audit. However, it has been specifically clarified that the information contained in the CbyC Report cannot be the sole material or conclusive evidence to propose transfer pricing adjustment or to opine that an international group is engaged in other forms of BEPS. This is an extremely important aspect of the proposal and should clearly put the taxpayers' anxiety to rest as well as hopefully curb any unwarranted inquiries and litigation.

Lastly, reiteration of strict safeguards for maintaining confidentiality of CbyCR information, discourages any potential misuse of the taxpayer's information.

### **Rohan Phatarphekar (Partner, Transfer pricing and BEPS, Deloitte India)**



After the end of the first challenging year of BEPS Action 13 implementation in India, thoughts have progressed to how the information submitted in CbCR would be used. The CBDT's internal instruction relating to appropriate use of CbCR information in India is a positive step towards addressing few of the taxpayers concerns, as these instructions provide clarity on some of the fundamental aspects of use of such information by authorities.

It is appreciated that the information would be shared with the jurisdictional transfer pricing officers (TPO) only pursuant to the risk based assessment conducted by specified senior level authorities (Competent Authority, Director General of Income-tax (Risk Assessment) and the Centralised Risk Assessment Unit). However, the parameters for the risk based assessment, subsequent to which the CbCR information would be shared with the TPO have not been specified, which would be useful to know.

The instruction spells out the purpose for which the CbCR information would be used, which is aligned to BEPS Action 13 guidance, i.e. use of the information for high level transfer pricing risk assessment, economic and statistical analysis, tax audit planning and other BEPS related risk assessment. It is important to note that the instruction clarifies that the queries raised by the TPO

need not be restricted only to the potential risks earlier identified by the specified authorities, thus providing the TPO's with a broader purview for audit.

Though the instruction provides surety that the CbCR information would not substitute a detailed TP audit nor would it be the only piece of information considered to propose a transfer pricing adjustment, the wide ranging use of the CbCR information across all tax matters (not only TP) would definitely be a cause for concern for taxpayers. On the other hand, the clarification on confidentiality of information and the processes proposed to review and monitor the use of information (such as reporting to the jurisdictional CIT(Transfer Pricing) of any breach of appropriate use conditions raised by taxpayers, and if unresolved, escalated to the Competent Authority), should provide some comfort to the taxpayers. It would be interesting to watch how these instructions are practically implemented and enforced by the Indian tax authorities.

### Simachal Mohanty (Head, Global Taxation, Dr Reddy's Laboratories Ltd.)



Central Board of Direct Taxes (CBDT) has issued Instruction no 2/2018 about the appropriate use of Country by Country Report (CbCR). While Master File and Local File are prepared and submitted by the entities in their respective tax jurisdiction, CbCR is prepared by the Ultimate Parent Company of the Group and is submitted to its designated authorities in its country of residence. Such CbCR will be exchanged among relevant stakeholder countries for exchange of

information.

This instruction deals with two important aspects

1. Appropriate use of CbCR Reports & its monitoring.
2. Confidentiality

Following is the summary of the appropriate/inappropriate use of CbCR report by a TPO :

Appropriate Use	Inappropriate Use
<p><b>Mandatory conditions :</b></p> <p>a) High level of transfer pricing risk assessment.</p> <p>b) Assessment of other BEPS related risk.</p> <p>c) Economic and statistics analysis</p>	<p>a) Use of CbCR as a substitute to detailed TP analysis of international transaction/ALP determination.</p> <p>b) Use as 'only' material for TP adjustment.</p>
<p><b>Other Conditions :</b></p> <p>a) For planning a tax audit</p> <p>b) As basis for making further enquiries into group's TP arrangement in course of the audit</p>	

Instruction also outlines that the CbCR information accessed by TPO is confidential and detailed guideline on maintaining confidentiality to be followed by them.

Monitoring , control and review mechanism requirement as prescribed in this instruction puts the responsibility on jurisdictional CIT (TP) and also requires Principal CCIT (Intl tax & TP) to submit a quarterly report to Board ( through Competent Authority of India).

The instruction is very important in the following aspects :

- Appropriate Use condition requires that the TP assessment should continue as detailed as before, CbCR will only be used as an ‘aid/tool’ and not a ‘substitute’ to TP assessment.
- Taxpayer’s concern on breach of appropriate use shall be reported by TPO and will be resolved by CIT (TP).
- Quarterly report by Principal CCIT to the Board requires his own comment i.e. ‘Remarks of Principal CCIT (IT & TP)’. It means he will have the thorough understanding of the cases to enable him to give his own opinion on the matter.
- It appears that such Quarterly report is to be prepared for all the TP assesseees for which TP assessment is done through access of CbCR, irrespective of the facts whether there has been appropriate use of CbCR or not. This is a voluminous activity and likely to consume good amount time of the revenue authorities both for review and preparation.

**Conclusion :** Apparently, this instruction has been issued pursuant to the OECD ‘Guidance on appropriate use information contained in CbCR’ issued in September 2017 especially to ensure appropriate use of CbCR and its confidentiality in the light of exchange among stakeholder countries.

It is a matter of fact that Indian revenue authorities have impeccable record of maintaining confidentiality in relation to the taxation related information. This instruction is a step forward towards formalization of such adorable confidentiality measures maintained by the Indian Revenue authorities over the years.

### **Arun Chhabra (Director, Grant Thornton Advisory Private Limited)**



The timing of the Instruction on use of CbCR is apt, considering the approaching exchange of CbCRs between countries after the recently concluded filings. The current Instruction on appropriate use of CBC reports by Indian tax authorities is based on Handbook of effective tax risk assessment which was published by OECD. India has been actively implementing various recommendations made by OECD as part of its BEPS framework and this instruction is reiteration of that stance. A number of measures have been put in place in the instruction allay any fears regarding confidentiality and appropriate use of CbCR by tax authorities. These include restricting the access of CbCRs to Competent Authority, DGRAs, and TPOs, and laying down the specific areas where tax officers may employ the CbCRs during audits. Furthermore, the TPOs have been directed not to use the CbCR as a substitute for detailed arm’s length analysis or as a sole reference material for proposing a transfer pricing adjustment. These are by and large in line with the recommendations of OECD and should address some concerns of the taxpayers. Having said that does leave some ambiguity while laying down checks and balances for ‘appropriate use’ of CBCR report and also in laying down measures to ensure confidentiality.

Therefore, on ground implementation of the instructions would determine whether the fears of taxpayers have been effectively addressed.

Having said that, efforts of the Indian Government to show commitment to the BEPS Project are truly commendable. The guidance comes just a month after the release of OECD's peer review report, wherein OECD had highlighted the need for taking steps around confidentiality/ use of CbCR before start of automatic exchange. This is clearly demonstrative of the intent to build a transparent and inclusive tax framework.

### **Rakesh Nangia (Managing Partner, Nangia Advisors LLP)**



Many jurisdictions (including India) have revised their local TP rules/ regulations following the recent changes to the global tax policy landscape being pioneered by OECD. Accordingly, this instruction is a welcome step as it addresses area of concern of the taxpayer pertaining to confidentiality of information, use of data forming part of CBC report and its impact on litigation. It brings about uniformity in the way these changes will be administered in India with those done globally by other tax jurisdictions. Having said the above, it would still remain to be seen how these instructions are implemented on ground. As any inappropriate and unrestrained use of information forming part of the CBC Reports would lead to opening of new issues and new intensity of litigation pertaining to TP and other areas in the future.

### **Karishma R. Phatarphekar (Partner- Litigation & Transfer Pricing, Deloitte)**



It is heartening to note that CBDT has issued detailed guidance on most crucial aspects of use of Country by Country Reports (CBCR) much in advance before the relevant scrutiny would take place next year. These guidance are in line with the overall commitment to OECD and I am sure will re-assure the tax payers of the seriousness and intent of the government to use the information only for risk assessment purposes. There are important aspects like confidentiality, how the TPO can use the information and controls over mis-use suggested.

One aspect which may warrant further guidance is on concerns raised by taxpayers on breach of appropriate use of CBCR information. As per the guidance, the tax payer is required to bring to the jurisdictional CIT(TP) breach of appropriate use of information and if unresolved bring it to the attention of the Competent Authority, immediately. However, in the interim stage until this is resolved the TP/Assessment order using such information would be issued and tax payer would be saddled with going through litigation on this unnecessarily. It may be appropriate for the CBDT to consider stay of the proceedings until the competent authority has resolved the issue brought before itself on inappropriate use of CBCR information. Like the DRP proceeding there should be a time frame prescribed for the competent authority to address these complaints. Also an opportunity to show cause why such inappropriate use must not be upheld by the competent authority must be provided by the competent authority to the tax payer as a part of the formal process. This aspect may be crucial, as if the tax payer wishes to proceed for further appeals, being aggrieved by such orders, then the higher courts would also not set aside or dismiss such appeals for lack of alternate remedies not being exhausted. It will help in therefore only those cases to go up for appeal which have been duly considered by the highest body prescribed by the CBDT i.e. the Competent authority in this case.

Filing of the CBCR and master file in India is going to definitely change the landscape of TP disputes in India. With information being shared on a transparent basis newer aspects of policies adopted by MNCs for international transactions, not necessarily connected to India and the overall strategy and structure is going to be made available to the TPOs. With the completeness of the information on a transaction and overall view, the TPO should try to use the information as suggested in the guidance purely to factor risk areas and not use the information to apply new methods like PSM and other method etc or use it as a substitute to a proper arm's length analysis.

While the guidance lays down clearly the instances of how and when information obtained through CbC Reports may be used, the key to re-assure the tax payer would be in successful implementation of these principles in substance and not just in process. I like the particular guidance wherein the CBDT has stated in this guidance of promptly conceding by Competent Authority in MAP proceedings in situations of inappropriate use of CbC reports. This is also a bold statement to make and will discourage revenue to use the information as suggested in the guidance. I also believe that CBDT should make it clear that in APA and MAP proceeding as well similar guidance should apply and there should be an escalation mechanism for inappropriate use of CbC reports during the negotiation process.

To sum up, it is a pro-active move on CBDT to issue these guidance and I am sure this will further be sharpened and re-aligned as we move into the post BEPS landscape in India.

**Maulik Doshi (Partner, International Tax and Transfer Pricing, SKP Business Consulting LLP)**



The concerns of the Taxpayers on 'appropriate use' of information provided in Country by Country Report (CbCR) / Master File have been ever increasing, especially after the first round of filings in India. The CBDT has released the much awaited guidelines on 'appropriate use' of CbCR.

It may be recalled that the final report on Action Plan 13 (at para 56) describes the 'appropriate use' of CbCR information as one of 3 conditions underpinning the obtaining and use of CbCR , together with 'Confidentiality' & 'Consistency'. Later, in September 2017, the OECD also released separate guidance on the appropriate use of information contained in CbCR.

Understandably, the CBDT instructions on 'appropriate use of CbCR' are in lines with above OECD guidelines, viz:

1. High level transfer pricing risk assessments
2. Assessment of other BEPS related risks; and
3. Economic and statistical analysis

Also, the rights given to the field officers for using the CbCR information for 1) Planning a tax audit and 2) using the information as a basis for making further enquiries, is in line with OECD guidelines.

The instruction rightly suggests that the use of CbCR information as a substitute for detailed transfer pricing analysis, or, as the only material for proposing transfer pricing adjustment will be



considered as 'inappropriate use'.

The CBDT has also proposed quarterly reporting on appropriate use of CbCR as a tool to monitor, control and review.

**Munjal Almoula (Partner, Grant Thornton India LLP)**



CBDT's issuance of guidance on appropriate use of CbC Reports is a welcome step as it provides reasonable clarity on the manner in which the information filed through the CbC report would be applied by the Indian Revenue. It is indeed comforting to note that the CBDT guidance is consistent with the OECD report as regards the usage of the information emanating from the CbC filings. CBDT has clarified that information obtained through CbC Reports would be used by the

Indian Revenue only for the purpose of high level TP risk assessment, assessment of other BEPS related risks and for economical / statistical analysis. Any further usage of the information or substitution of the transfer pricing analysis by such data would be considered inappropriate