

# Adding value



## Transfer Pricing Update

Latest news on TP in India

November 2017

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### Zusammenfassung

Die steuerliche Anerkennung grenzüberschreitender Verrechnungspreise zwischen verbundenen Unternehmen ist ein zentraler Bestandteil des indischen Steuerrechts. In Folge des Projekts der OECD gegen Base Erosion and Profit Shifting ("BEPS") passte Indien sein Steuerrecht an - mit Auswirkungen auch für Deutsch investierte Unternehmen. Obgleich Indien nicht Mitglied der OECD ist, folgt das Land im Bereich BEPS doch ihren Vorschlägen und schuf bereits im Februar 2016 die Rechtsgrundlagen für ein Master File Konzept und ein Country-by-Country ("CbC") Reporting. Ende Oktober 2017 wurden nun die Ausführungsbestimmungen erlassen.

Für Erstellung und Einreichung einer Master File gelten niedrige Umsatzschwellen. Entsprechend viele ausländisch investierte Unternehmen sind betroffen. Kritische Stimmen aus der indischen Industrie, die für höhere Umsatzschwellen eintraten, wurden durch die Regierung nicht gehört. Inhaltlich geht das indische Konzept über die Vorschläge der OECD hinaus. So verlangt Indien beispielsweise anstelle einer nur allgemeinen Beschreibung der grenzüberschreitenden Finanzierung eine detaillierte Darstellung der Modalitäten.

Im Bereich CbC Reporting lehnt sich Indien stärker an das OECD Modell an. Die Umsatzschwellen wurden übernommen. Allerdings lauten sie in Indische Rupien, so dass Wechselkursschwankungen jährlich eine Neubewertung der Abgabepflicht erfordern lassen. Auch im Inhalt folgt Indien den Vorschlägen der OECD.

Die indischen Einkommensteuerrichtlinien regeln die Formate, in denen Master File und CbC Reporting erstellt werden müssen. Für das Finanzjahr 2016-17 (1. April 2016 bis 31. März 2017) ist Frist zur Abgabe der 31. März 2018. Indische Unternehmen bereiten sich derzeit zum ersten Mal auf die neuen Dokumentationspflichten vor.

### Executive Summary

Transfer Pricing is a hot topic in Indian taxation. Following global changes with the OECD Base Erosion and Profit Shifting ("BEPS") project, Transfer Pricing in India is undergoing changes which also affect German invested enterprises in India. Though not being an OECD member, India follows the 2016 OECD BEPS proposals and has implemented its Master File and Country-by-Country ("CbC") reporting ("CbCR") requirements already in February 2016. Now, end of October 2017, the missing Master File and CbCR guidelines have been introduced.

For applying the Master File guidelines which govern maintenance and furnishing of the Master File, low thresholds have been notified. Many foreign invested companies will be covered. Critical comments given by industry in response to the Draft Rules, have not been accepted by the Indian Government. Content wise, the new Indian Master File guidelines are more stringent than OECD model guidelines, inter alia requiring a detailed description of financial arrangements instead of a general description.

With regard to the CbC reporting the OECD threshold has been applied. With the Indian threshold being prescribed in INR the applicability of CbC regulations will have to be revisited every year based on the foreign exchange rate as prescribed in the Indian Income Tax Law. Content wise, the new Indian CbCR guidelines are in line with OECD model guidelines.

Indian Income Tax Rules prescribe the forms to be filed in order to comply with the Master File and CbCR regulations. For the first time, Indian taxpayers are now preparing to file their compliance forms on or before 31<sup>st</sup> March 2018 for the Indian Financial Year ("FY") 2016-17 (12<sup>th</sup> April 2016 to 31<sup>st</sup> March 2017).

## Final Rules on Master File and Country-by-Country Report

### 1. Legislative Background

In February 2016, keeping up with the commitment of implementing the BEPS measures for "Three Tier Transfer Pricing Documentation" as envisaged in Action Plan 13 - Final Report, the Indian Finance Minister while presenting the Finance Act 2016, had introduced the legislative requirement for filing Country-by-Country Report ("CbCR/ Report") and maintaining and furnishing of a Master file. The detailed legislative framework for both these compliances was awaited by the Taxpayers, and now after prolonged wait of more than a year, the Central Board of Direct Taxes ("CBDT") has now issued Final Rules ("Rules") vide notification no. 92/ 2017/F. No. 370142/25/2017-TPL, dated 31<sup>st</sup> October 2017. Accordingly, Rule 10DA and 10DB have been inserted in the Income Tax Rules, 1962, and Form 3CEAA to Form 3CEAE have been notified.

These rules provide for documents to be maintained, the threshold where the maintenance of data is triggered, the due date for furnishing the information, the form in which information to be furnished, the prescribed authority to whom information to be furnished, etc. .

### 2. Master File – Rule 10DA

The Finance Act 2016, has introduced the new Master File Concept in India with effect from Financial Year ("FY") 2016-17. Accordingly, an entity (including a permanent establishment) being part of an international group and which has entered into an international transaction, needs to comply with the master file provisions. However, the applicability, contents of master file, form and due date of filing master file was not prescribed at that time, which are now prescribed.

#### 2.1 Introduction

As per Rule 10DA, master file is required to be kept and maintained by every person, being a constituent entity of an international group, if:

- The consolidated group revenue for the accounting year exceeds INR 5 billion (Approx. EUR 66.66 million<sup>1</sup>) **AND**

- Aggregate value of international transactions during the accounting year, as per books of accounts, exceeds INR 500 million (Approx. EUR 6.66 million<sup>1</sup>) **OR** International Transactions in respect of intangible property exceeds INR 100 million (Approx. EUR 1.33 million<sup>1</sup>).

#### 2.2 Contents of Master File

An exhaustive list of Information and documents of the international group, to be kept and maintained is prescribed, and is fairly in line with BEPS Action Plan 13. This information is covered under Part B of the Form 3CEAA as prescribed. However, following are the **key deviations**:

Contents of Master File as per Indian regulation	Contents of Master File as per OECD BEPS Action Plan 13
As per Indian regulations, it is required to maintain a description of the functions performed, assets employed and risks assumed by the constituent entities of the international group that contribute <b>at least ten percent of the revenues or assets or profits of the group</b>	BEPS Action Plan 13 requires, a brief written functional analysis describing the <b>principal contributions to value creation</b> by individual entities within the group, i.e. key functions performed, important risks assumed, and important assets used
The Indian regulations prescribed a new requirement, viz., list of entities of the international group engaged in <b>development and management</b> of intangibles along with their addresses	No such requirement in OECD BEPS Action Plan 13
A detailed description of the financing arrangements of the international group, including the names and addresses of the <b>top ten unrelated lenders</b>	OECD BEPS Action Plan 13 requires, a general description of how the group is financed including important financing arrangements with unrelated lenders

<sup>1</sup> Considering INR 75 / 1 EUR

### 2.3 Due date, Form in which the Master File has to be furnished and other particulars

A brief overview of the framework for furnishing the master file is as follows:

Responsibility of furnishing	Filing Obligation	Due date
Every constituent entity even where threshold to furnish master file as mentioned above in para 1.1 is not applicable	<b>Part A of Form 3CEAA</b> – General information	On or before 30 <sup>th</sup> November for every year.
Every constituent entity where threshold to furnish master file as mentioned above in para 1.1 is applicable	<b>Part A of Form 3CEAA</b> – General information <b>Part B of Form 3CEAA</b> – Contents of master file (as referred to in para 1.2 above)	However, due date for FY 2016-17 is 31 <sup>st</sup> March 2018.
Every constituent entity being a designated entity <sup>2</sup> where threshold to furnish master file as mentioned above is not applicable	<b>Part A of Form 3CEAA</b> – General information Additionally, <b>notification report</b> by designated constituent entity (so determined by the international group) in <b>Form 3CEAB</b> .	On or before 30 <sup>th</sup> November for every year. However, due date for FY 2016-17 is 31 <sup>st</sup> March 2018.
Every constituent entity being a designated entity <sup>2</sup> where threshold to furnish master file as mentioned above is applicable	<b>Part A of Form 3CEAA</b> – General information <b>Part B of Form 3CEAA</b> – Contents of master file (as referred to in para 1.2 above) Additionally, <b>notification report</b> by designated constituent entity (so determined by the international group) in <b>Form 3CEAB</b> .	Additionally, notification report should be filed at least 30 days before the due date of filing i.e. 30 days before 30 <sup>th</sup> November. In case of FY 2016-17 on or before 30 days of 31 <sup>st</sup> March 2018.

- Above reports are required to be furnished to **Director General of Income-Tax (Risk Assessment) ("DGIT")**; All filings would be done electronically and the online utilities for the same would be prescribed in due course;
- The Rules also specify that for the calculation of the value of consolidated group revenue available in foreign currency in Indian Rupees (INR), the telegraphic transfer buying rate of such currency on the last day of the accounting year shall be used. Telegraphic transfer buying rate shall have same meaning as assigned in the Explanation to existing Rule 26 – which states that the rate shall be as adopted by the State Bank of India for buying currency through a telegraphic transfer.
- The information relating to master file has to be maintained by the tax payer for a period of 8 years from the end of the relevant assessment year;
- The terms "accounting year", "consolidated financial statement" and "international group" have been defined.
- Failing to furnish the Master File may attract a penalty of INR 0.5 million.

### 3. CBC Report – Rule 10DB

The legislative change for furnishing of CbCR in the Income Tax Act was made through introduction of Section 286 in Finance Act 2016, which required furnishing of report in respect of International Group by an Indian parent entity or alternate reporting entity who are residents in India, or in certain exceptions even by a constituent entity of whom the parent entity is not resident of India.

However, certain finer points were unclear, as to the format of CbCR, or the due date of notifying about details of parent entity filing CbCR, or the monetary threshold for applicability of CbCR requirement, or the appropriate authority to whom filing had to be made, etc., and are now clarified through this Rule.

<sup>2</sup> Where there are more than one constituent entities of an international group resident in India, the entity designated by the international group will furnish the particulars with respect to the master file

### 3.1 Introduction

A brief overview of the rules indicating CbCR reporting framework is as follows:

Framework	Indian Parent Entity or Alternate Reporting Entity resident in India	Constituent Entity resident in India, but parent entity or alternate reporting entity not resident in India
<b>Monetary Threshold</b>	If consolidated group revenue exceeds <sup>3</sup> INR 55 billion (Approx. EUR 733 million <sup>4</sup> ) in accounting year applicable to parent entity, preceding the accounting year for which CbCR has to be filled.	If consolidated group revenue exceeds <sup>3</sup> INR 55 billion (Approx. EUR 733 million <sup>4</sup> ) in accounting year applicable to parent entity, preceding the accounting year for which CbCR has to be filled.
<b>Primary Responsibility</b>	<p>CbCR is to be Filled in Form 3CEAD to DGIT.</p> <p>And, in case if more than one constituent entity of same International Group are residents in India, parent entity has to notify DGIT in Form 3CEAE about the entity designated by the group to file CbCR.</p>	<p>Notify the DGIT in Form 3CEAC, about the details of Parent Entity or Alternate Reporting Entity, and Tax Jurisdiction in which they are Residents.</p> <p><u>Exceptions:</u> If India doesn't have agreement to exchange CbCR with such tax jurisdiction, then filing obligation (Form 3CEAD) will fall back on constituent entity.</p> <p>And, in case if more than one constituent entity of same International Group are residents in India, parent entity has to notify DGIT in Form 3CEAE about the entity designated by the group to file CbCR in Form 3CEAD.</p>

Framework	Indian Parent Entity or Alternate Reporting Entity resident in India	Constituent Entity resident in India, but parent entity or alternate reporting entity not resident in India
<b>MCCA for CbCR Exchange</b>	NA	India has already signed the MCCA, therefore if Parent entity or alternate reporting entity is located in Tax Jurisdictions who have signed MCAA, constituent entity would not be required to file CbCR.
<b>Due Dates</b>	Form 3CEAD on or before 30 <sup>th</sup> November for every year. However, CBDT has given an extension up to 31 <sup>st</sup> March 2018 for FY 2016-17 vide circular no. 26/2017 dated 25 <sup>th</sup> October 2017.	<p>Form 3CEAC to be filed at least 2 months prior to the due date which is 30<sup>th</sup> November for every year or in case of FY 2016-17, 31<sup>st</sup> March.</p> <p>Form 3CEAD and Form 3CEAE on or before 30<sup>th</sup> November for every year. However, CBDT has given an extension up to 31<sup>st</sup> March 2018 for FY 2016-17 vide circular no. 26/2017 dated 25<sup>th</sup> October 2017.</p>

**Abbreviations:**

MCCA: Multilateral Competent Authority Agreement

NA: Not Applicable

<sup>3</sup> Where the total consolidated group revenue of the international group, as reflected in the consolidated financial statement, is in foreign currency, the rate of exchange for the calculation of the value in Indian rupees shall be the TT buying rate as defined in Rule 26 (see para 1.3 above).

<sup>4</sup> Considering INR 75 / EUR

### 3.2 Contents of CbCR

As enlisted above, filing of CbCR has to be done in Form 3CEAD. This Form is in line with the model template for CbCR as contained in BEPS Action 13 Final Report. This Form for CbCR is divided into three parts, Part A is about "Overview of allocation of income, taxes and business activities by tax jurisdiction", Part B is for "List of all the constituent entities of the multinational enterprises ("MNE") group included in each aggregation per tax jurisdiction", and Part C is for "Additional Information" i.e. brief information or explanation that is considered necessary or that would facilitate the understanding of the information provided in Part A and Part B.

Further, the definitions for terms like "Tax Jurisdiction", "Revenues", "Income Tax Accrued/Paid", "Number of Employees", etc., as used in Form 3CEAD, has been provided. These definitions are again mostly replicated from the Specific Instructions for CbCR as contained in BEPS Action 13 Final Report.

A graded per diem penalty may be attracted in case of failure of furnish the CbCR and an additional penalty of INR 0.5 million may be levied for inaccuracy in the CbCR so filed.

## 4. Comments

In a nutshell, the much-awaited rules have provided tax-payers a relief by giving extension for filing master file and CbCR for FY 2016-17. However, following are certain bottlenecks which may lead additional burden or ambiguity:

- The term "accounting year" has been used in second condition of threshold for applicability of master file (as mentioned in para 1.1 above) would require more clarity. Since, accounting year is defined to mean that the accounting period normally followed by foreign parent company. Most of the foreign countries follow calendar year as an accounting year. Therefore, aggregate amount of international transactions to be considered for the accounting year followed by parent entity or April to March fiscal year as reported by an Indian entity, needs to be clarified.
- CbCR applicability threshold needs to be verified every year considering the year end TT Buying rate of State of Bank of India.
- Additional reporting requirements as per Indian master file vis-à-vis BEPS Action Plan 13 of OECD resulting into additional compliance burden (as mentioned in para 1.2 above).
- Further, public recommendations with respect to lower threshold for applicability of the master file provisions, are not taken into consideration. Consequentially, international group having parent company resident outside India and subsidiary company(s) in India, may require to prepare master file only for India.

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