



*FAQs on expected three-tiered TP
documentation rules in India*
August 2017





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Given that this is the first year of the implementation of the three-tiered TP documentation approach as per BEPS action plan 13 in India and the corresponding newly enacted provisions of the Act, a host of questions concerning this requirement have arisen over the last few months. Certain clarifications are expected from the Government of India in this regard. Further, detailed Rules (to be introduced in The Rules) on the implementation of this requirement are also expected soon.

Through this publication, we have attempted to collate potentially key issues and to capture the open points that the detailed Rules could be expected to address. In answering some of these questions, we have relied on the OECD guidelines. Accordingly, the views expressed in this document should not be taken

as definitive positions on the issues but only as possible/preferred viewpoints which are likely to evolve further.

The issues and our views on them have been documented in the form of simplified FAQs and answers. In answering some of these FAQs, we have also sought inputs from the BEPS Group, a group of clients and a special PwC team that was formed to discuss BEPS Action Plans.

We have also presented these recommendations to senior tax officials to address them in finalising these much awaited rules. The answers marked with an asterisk (*) reflect our representation to the Revenue on those points where additional clarification is needed. Further, some of our specific representations have been highlighted separately alongside the respective point.



I. Filing obligations



Question 1

What are the filing obligations for an IGE with respect to three-tiered TP documentation?



Answer

Nature of obligations	Obligations	Open points	Expectation from the Rules
Notification of CbCR	<p>An IGE will need to file the notification with the prescribed authority in India by the prescribed date.</p> <p>The notification shall inter alia contain the following:</p> <ul style="list-style-type: none"> • Details of UPE (or its nominated ARE) • Information on their country/territory of tax residence 	<ul style="list-style-type: none"> • Date of filing of the notification • Format of the notification • Prescribed authority for filing the notification 	<ul style="list-style-type: none"> • The due date for filing of the notification should be the due date for filing the return of income.¹ • A separate form for filing should be notified
CbCR	<p>An IGE will need to file a CbCR in India if the UPE resides:</p> <ul style="list-style-type: none"> • In a country, with which India does not have an agreement for exchange of CbCR, or • In a country, where there has been a systemic failure to exchange information despite an agreement, and the said failure has been intimated by the prescribed authority to the IGE. 	<ul style="list-style-type: none"> • Prescribed authority for filing the notification 	<p>Extension in due date, if any, in case the UPE has not maintained/ provided information in relation to CbCR.</p>

¹ In accordance with the provisions of section 139(1) of the Act.



Nature of obligations	Obligations	Open points	Expectation from the Rules
MF	An IGE having international transaction(s) with AE(s) has the obligation to maintain and furnish the MF with the prescribed authority by the prescribed date.	<ul style="list-style-type: none"> • Threshold, if any, for the applicability of these provisions • Date of filing • Contents of the MF • Prescribed authority for filing the MF 	The due date for maintenance should be aligned with the due date of filing the MF by the UPE in the country or territory of its residence.
LF ²	An IGE should maintain the LF by the due date for filing the return of income. ³	<ul style="list-style-type: none"> • Contents of the LF 	The contents of the LF should be converged with the existing TP documentation requirements.



Suggestion

- To prescribe a minimum threshold/criteria for maintenance of the MF for the constituent entities to which the CbCR requirements doesn't apply;
- The prescribed authority should have discretion to grant exemption or extension in timelines in respect of filing the MF and CbCR in limited circumstances;
- Timeline for MF filing by IGE should be made concurrent with filing timelines in the jurisdiction of the UPE;
- To provide exemption for filing of MF, if IGE has no international transactions

² In all probability, the LF requirement is likely to be merged/aligned with current TP documentation as per Rule 10D of the Rules.

³ In accordance with the provisions of section 139(1) of the Act.



Question 2

What are the filing obligations of an inbound group which operates in India only through a PE(s) in India or otherwise has a return filing obligation since it receives taxable income in India?



Answer

Nature of obligations	Obligations
I. Notification of CbCR; II. CbCR	Only a 'constituent entity resident in India' is required to notify CbCR-related details. A PE, being a non-resident, should not be required to comply with this requirement.
MF	Required to be maintained and furnished. Also, see the answer to Question 1 above.
LF	Required to be maintained and furnished. Also, see the answer to Question 1 above.



II. CbCR



Question 3

What is voluntary filing and what impact does it have on the filing requirements, if any, of a CbCR by an IGE?



Answer

The OECD guidelines allow jurisdictions to accept voluntary filing of a CbCR irrespective of the timeline as per regulations of the residence country of a UPE. This option is expected to address the differences in the timing of the enactment of legislation relating to the implementation of CbCR in jurisdictions of UPEs and those of other constituent entities. Such voluntary filing is referred to as 'parent surrogate filing'.

As on date, the following jurisdictions have confirmed that

they will have parent surrogate filing available:

- Hong Kong, China
- Isle of Man
- Japan
- Liechtenstein
- Nigeria
- Russia Federation
- Singapore
- Switzerland (as per draft legislation)
- The United States of America

Subject to the conditions prescribed,⁴ where UPEs have elected for parent surrogate filings, the constituent entity (say IGE) should not be required to file a CbCR in India. (Also refer to the answer to Question 4 below.)



⁴ Conditions prescribed by the OECD are: the UPE jurisdiction requires filing of a CbCR; the UPE jurisdiction has a qualifying competent authority agreement with the country of the constituent entity for filing of a CbCR; the UPE jurisdiction has not reported a systemic failure; the UPE has notified its jurisdiction that the UPE is the surrogate parent entity; and the constituent entity had notified its jurisdiction that it is not the UPE or surrogate parent entity.



Question 4

If a UPE is a resident of a country (home jurisdiction) where a CbCR is not required to be filed, or if it has not opted for parent surrogate filing, will the IGE be required to file a CbCR in India?



Answer*

No, the IGE should not be required to file a CbCR in India.

The IGE will be required to file a CbCR in India only under the following circumstances:

- a. if the home jurisdiction of the UPE does not have an agreement with India which provides for exchange of CbCR; or
- b. there has been a systemic failure⁵ in respect of exchange under such an agreement.

Further, even under the aforesaid circumstances (subject to submission of information to be submitted in the yet-to-be-notified format), the IGE will not be required to file a CbCR if the ARE⁶ has furnished a CbCR in its territory and India has an agreement for exchange of CbCR with such a country or territory.



⁵ 'Systemic failure' has been defined in section 286(9)(l) of the Act. It may be noted that in an event where the home jurisdiction of the UPE has entered into an agreement with India for the exchange of CbCR, a mere delay in the enforcement or enactment of CbCR requirements in the parent entity's home jurisdiction would not constitute a systemic failure and, as such, would not trigger a CbCR filing requirement by the IGE in India.

⁶ ARE means any constituent entity that is designated by the UPE for filing a CbCR in which such an ARE is resident.



Question 5

Several countries have established their own thresholds for CbCR filings (which could differ from the 750-million EUR threshold). This could lead to situations where CbCR filings may be required in India but not in the jurisdiction of a UPE.

In such situations, will an IGE be required to file a CbCR?



Answer*

In such cases, the IGE should be exempt from such a requirement.

For example, Japan has prescribed a limit of 100 billion JPY (approximately 5,880 crore INR) for filing a CbCR. India, however, has prescribed a limit of 750 million EUR, which is approximately 5,611 crore INR, for filing a CbCR. In such

an event, a Japanese-headquartered MNE group having a turnover of 5,700 crore INR will not be required to file a CbCR in Japan (being the jurisdiction of the UPE). Accordingly, the Indian constituent entity of such a Japanese MNE group should also not be required to file a CbCR in India.





Question 6

If the home jurisdiction of a UPE has or does not have an agreement with India providing for exchange of CbCR, the IGE will be required to file a CbCR in India.

In this context, which/what will be an agreement that provides for exchange of CbCR?



Answer

The said agreement should specifically provide for exchange of CbCR. It could be an existing agreement (DTAA or treaty) which provides for information exchange and has been modified to specifically provide for exchanging of CbCR, or it could be a specific agreement for exchanging of CbCR.

India is a signatory to the CbCR MCAA, which will facilitate the automatic exchange of CbCR between India and other signatories. At present, 64 countries⁷ have signed the CbCR MCAA. Accordingly, it could be considered that India has entered into an agreement for exchange of CbCR with these 64 countries.



⁷ They are Argentina, Australia, Austria, Belgium, Belize, Bermuda, Brazil, Canada, the Cayman Islands, Chile, Costa Rica, Colombia, Curaçao, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guernsey, Haiti, Hungary, Iceland, India, Indonesia, Ireland, the Isle of Man, Israel, Italy, Japan, Jersey, Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malaysia, Malta, Mauritius, Mexico, the Netherlands, New Zealand, Nigeria, Norway, Pakistan, the People's Republic of China, Poland, Portugal, the Russian Federation, Senegal, Singapore, the Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, the Turks and Caicos Islands, the United Kingdom and Uruguay.

III. MF



Question 7

What are the contents of the MF?



Answer

The contents of a MF are expected to be aligned with the format prescribed by the OECD.



Question 8

If the MNE group is not required to file a CbCR, will the IGE still be required to maintain the MF?



Answer

Yes, the IGE should still be required to maintain and furnish the MF. Presently, there is no correlation between the threshold for filing of a CbCR and the MF.



Suggestion

Prescribe a minimum threshold/criteria for maintenance of the MF for the IGE to which the CbCR requirements do not apply.



Question 9

If the MNE group does not prepare the MF, as the jurisdiction in which it operates (other than India) does not have any legislative requirement to prepare/file the MF, will the IGE resident in India still be required to maintain and furnish the MF?



Answer

Yes, the IGE should still be required to maintain and furnish the MF.



I. Scope and coverage of CbCR



Question 10

What is the date for furnishing a CbCR?



Answer

The parent entity or an ARE is required to furnish a CbCR on or before the due date for furnishing the return of income.⁸



Question 11

Which entities will qualify as ‘constituent entities’ for the purpose of reporting in the CbCR?



Answer*

Entities whose results are consolidated on a line-by-line basis with those of the parent entity for the purpose of preparation of CFS of the group will qualify as constituent

entities. Entities whose results are consolidated with those of the parent entity using the equity method, should not qualify as constituent entities.



⁸ In accordance with the provisions of section 139(1) of the Act.



Question 12

If a constituent entity is a joint venture or a joint operation run by two or more partners, which of the partners will be required to report such a joint venture/operation in the CbCR?



Answer*

In case a constituent entity is a joint venture or a joint operation, the basis adopted for consolidating the results of this joint venture/operation with those of the respective partners will need to be evaluated.

In case the partners follow a proportionate line-by-line consolidation for reporting the joint venture's operations in their respective CFS, each of the partners should be required to report their proportionate share of revenues, taxes, employees, etc., in the joint venture's operations with an appropriate note in the CbCR.



II. Mechanics of reporting



Question 13

The CbCR will report financial data of different countries. How will the differences arising on account of the parameters mentioned below be reconciled while reporting CbCR data for an international group having an Indian parent?

- GAAP
- Currency
- Accounting year
- Related party definitions



Answer*

GAAP, currency and accounting year applied by an Indian parent entity in preparing CFS should form the basis for reporting CbCR data.

As for related-party definitions, the OECD explained that the term

‘related parties’ appearing in the third column of Table 1 of the CbCR should be interpreted as ‘constituent entities’ listed in Table 2 of the CbCR.





Question 14

How should CbCR reporting be undertaken with respect to specific income of an MNE group which is covered by treaty provisions, where the taxing rights on such income are allocated exclusively to one jurisdiction (for example, income derived from international transportation or transportation in inland waterways covered by Article 8 of DTAAs)?



Answer*

Information required to be reported in the CbCR with respect to the above-mentioned income should be included against the name of the jurisdiction to which the relevant treaty provisions allocate these taxing rights.



Question 15

If there is more than one constituent entity in a jurisdiction, should the aggregate data be reported or should the data that is reported for the jurisdiction consist of consolidated data which eliminates intra-jurisdiction transactions between constituent entities in that jurisdiction?



Answer

Consistent with the guidance provided by the OECD, the data should be reported on an aggregate basis, regardless of whether the transactions occurred cross-border or within the jurisdiction, or between related parties or unrelated parties. The MNE group may use the notes section in Table 3 to explain the data.

III. PEs



Question 16

In case an Indian company carries out business in other countries only through PEs (say branches), will such an Indian company be required to file a CbCR?



Answer*

Yes, such an Indian company should be required to file a CbCR if the prescribed consolidated group revenue threshold is met.



Question 17

In case an Indian company carries out business in other countries only through PEs (say branches), will such an Indian company be required to file the MF?



Answer*

As per the current provision, as there are no international transactions, there should be no requirement for filing the MF.



Question 18

How should data regarding a PE be reported?



Answer*

Data of a PE should be reported with reference to the tax jurisdiction in which the PE is situated and not with reference to the tax jurisdiction of the entity having a PE in an overseas jurisdiction.

For example, if an Indian parent entity has a PE in the UK, then, under the same CbCR:

- while reporting data for India, data for the UK PE should be excluded; and
- the data for the UK PE should be included while reporting data for the UK.



IV. MF



Question 19

What is the date for furnishing the MF?



Answer

The prescribed date for furnishing the MF could be 30 November 2017 (for the first year of compliance), which is in line with the due date for filing the return of income and the Accountant's Report in Form 3CEB for the Indian FY 2016–17 (the Indian FY being from 1 April to 31 March).



Question 20

If there is a signed APA for the international transactions, is there still a requirement to prepare and file the MF?



Answer

Yes. The MF should be prepared and filed regardless of whether or not a signed APA is in place.



Question 21

Is there any exemption from maintaining and furnishing the MF? In other words, is there any threshold for maintaining and furnishing the MF?



Answer*

The MF is required to be maintained and furnished by the parent entity of the international group if it has entered into an international transaction or specified domestic transaction. Accordingly, at present, there is no threshold/exemption limit.



Suggestion

Provide exemption for filing of MF if Indian company has no international transactions.

V. Threshold for CbCR



Question 22

If, in a constituent entity, unrelated parties hold minority interests, then, for the purpose of computing the consolidated group revenue to measure against the 750-million EUR threshold (or the INR equivalent as prescribed), should the consolidated group revenue include 100% of the constituent entity’s revenue or should it be pro-rated for the minority interest component? Further, should the financial data for this entity that is required to be included in the CbCR be pro-rated or reported 100%?



Answer

If, as per the presentation in the CFS under applicable accounting standards, the constituent entity is required to be fully consolidated (i.e. not on a proportionate basis), then 100% of this entity’s revenue should be considered for the purpose of

applying the consolidated group revenue threshold. In such a case, even the financial data of this entity that is included in the CbCR should represent 100% amounts, and should not be pro-rated.

In contrast, the answer could be to pro-rate if as per the presentation in the CFS under applicable accounting standards, the constituent entity is required to be consolidated on a proportionate basis. This is consistent with the position in the recently published clarification by the OECD.



Question 23

What would the definition of ‘revenue’ be for the purpose of computing the consolidated group revenue to measure against the 750-million EUR threshold (or the INR equivalent as prescribed)?



Answer

All of the revenue as reflected (or would be reflected) in the CFS should be considered. The revenue

should be considered on either gross or net basis, depending upon how it is reflected in the CFS.

The revenue should include extraordinary income and gains from investment activities.



Question 24

What if the revenue of an MNE group meets the prescribed consolidated group revenue threshold in some years, but not in other years?



Answer

The revenue threshold needs to be tested on an annual basis. In the years that such a threshold test is not met, the MNE group should have no obligation to file a CbCR.

In other words, an MNE group should be required to file a CbCR for an accounting year only if its group

revenue in that accounting year meets the prescribed consolidated group revenue threshold. Therefore, an MNE group might be required to file a CbCR in one year but not in the following or previous year. For example, if the prescribed consolidated group revenue

threshold is, say, 54,000 million INR, and if an MNE group's consolidated group revenue with respect to 2016 is 53,000 million INR, and with respect to 2017, it is 55,000 million INR, then the MNE group will be required to file a CbCR only for 2017 and not for 2016.



VI. Residency test



Question 25

The CbCR template, as provided in the OECD's BEPS Action Plan 13 Report (assuming that the same is prescribed in the Indian law as well), requires information to be reported for constituent entities resident in a tax jurisdiction. Since the residency rules prevailing in different jurisdictions may vary, what will the mechanism to identify whether or not a particular entity is a resident of a particular jurisdiction be?



Answer*

To identify whether or not a particular entity is a resident of a particular jurisdiction, it may be acceptable to apply the residency tests as per the law in force in the respective jurisdictions.





Question 26

What are the penalties for non-compliance with the provisions relating to CbCR and MF?



Answer

The penalties are as follows:

Sr. no.	Nature of default	Penalty (INR)
1	Non- furnishing of CbCR and the failure continues for a period of one month	5,000 per day of default
2	Non-furnishing of CbCR and failure continues beyond a period of one month	15,000 per day of default
3	Non-furnishing of CbCR even after levy of penalty based on 1 or 2 above (i.e. for delay beyond the date of service of penalty order based on 1 or 2 above)	50,000 per day of default
4	Non-submission of information/document called for in relation to CbCR	5,000 per day of default
5	Non-submission of information/document called for in relation to CbCR even after levy of penalty based on 4 above (i.e. for delay beyond the date of service of penalty order based on 4 above)	50,000 per day of default
6	Furnishing of inaccurate information/document in CbCR or in relation to CbCR	5,00,000
7	Failure to furnish MF	5,00,000



Question 27

If an ARE resident in India is designated to file a CbCR in India and fails to comply with CbCR requirements, will penalties be faced by the parent entity or by the ARE?



Answer

The penalties referred to above should be faced by the ARE since penalties associated with CbCR-related non-compliance apply to the 'reporting entity', and the 'reporting entity', by definition, includes the ARE.





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Glossary

AEs	Associated enterprises
ARE	Alternate reporting entity
BEPS	Base Erosion and Profit Shifting
CbCR	Country by Country Reporting
CbCR MCAA	Multilateral Competent Authority Agreement for Exchange of CbCR
CBDT	Central Board of Direct Taxes
CFS	Consolidated financial statements
DTAA	Double Tax Avoidance Agreement
FAQ	Frequently asked question
FY	Financial year
GAAP	Generally accepted accounting principles

IGE	Inbound group entity resident in India
LF	Local File
MF	Master File
MNE	Multinational enterprise
OECD	Organisation for Economic Cooperation and Development
PE	Permanent establishment
The Act	Income-tax Act, 1961
The Rules	Income-tax Rules, 1962
TP	Transfer pricing
UK	United Kingdom
UPE	Ultimate parent entity





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First-time adoption of the new three-tiered transfer pricing documentation measures are likely to give rise to several questions among companies. I would like to thank **Kunj Vaidya, National Leader, Transfer Pricing (+91 996 209 5555), Bipin Pawar, Partner, Transfer Pricing (+91 844 774 2779), and Eric Mehta, Partner, Transfer Pricing (+91 990 157 1868) at Price Waterhouse & Co LLP** for providing their technical inputs on these FAQs, which will help companies in getting some clarity on what may eventually be prescribed in the rules.



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