

OECD's first annual peer review report on BEPS Action 13 on CbC reporting

Summary

The Organisation for Economic Co-operation and Development (OECD) has released the first annual peer review report on Country-by-Country (CbC) reporting, a minimum standard contained in the Base Erosion and Profit Shifting (BEPS) Action 13 report released in 2015. The first phase of the peer review focused mainly on the domestic legal and administrative framework adopted by various jurisdictions, in order to assess the progress made on implementation of CbC reporting.

Scope of peer review

The peer review process focuses on three key elements of the minimum standard:

- (i) The domestic legal and administrative framework
- (ii) The exchange of information framework
- (iii) The confidentiality and appropriate use of CbC reports

Phases of peer review

There are three phases of peer review structured into annual reviews, starting respectively in 2017, 2018 and 2019.

- Phase 1 (as of January 2018¹): The first phase focused mainly on the domestic legal and administrative framework put in place by various jurisdictions to implement the CbC reporting requirements. The report also covers some aspects of the exchange of information framework as well as confidentiality and appropriate use.
- Phase 2 (launched in April 2018): The review will focus on the exchange of information framework as well as confidentiality and appropriate use.
- Phase 3 (starting in 2019): During this phase, the review will cover all three key aspects of jurisdictions' implementation, including the actual exchange of CbC reports.

¹ Report provides implementation status of around 95 jurisdictions.

Key findings from the first phase

- **Domestic legal and administrative framework:**
 - Comprehensive framework in place in 60 jurisdictions
 - Official publication of final legislation is awaited in a few jurisdictions
 - Recommendations given to 28 jurisdictions for improvement of their framework and to 33 jurisdictions for introducing/finalising their framework
- **Exchange of information framework:**
 - Multilateral or bilateral competent authority agreements in place in 58 jurisdictions for exchange of information, effective for taxable periods starting on or after 1 January 2016 or on or after 1 January 2017
- **Confidentiality and appropriate use of CbC reports:**
 - Detailed information provided by 39 jurisdictions, sufficiently assuring the CbC Reporting Group that measures are in place to ensure the appropriate use of CbC reports

Recommendations/Observations on Indian framework

- **Domestic legal and administrative framework:**
 - (i) CbC reporting threshold
 - Indian tax laws² provide a threshold of INR 55,000 million of consolidated group revenue for CbC reporting.
 - The above provisions may trigger CbC reporting for the Indian Constituent Entity (CE) of a foreign headquartered Multinational Enterprise (MNE) group, even where the CbC reporting threshold is not met in the ultimate parent entity's jurisdiction.
 - OECD suggested that India should amend or further clarify this provision, observing that the above provision is not aligned to its guidance.
 - (ii) Scope of 'related party revenue'
 - CbC report requires jurisdiction-wise details of 'revenue' generated from related and unrelated parties³. As per OECD's guidance, revenue from 'CEs'⁴ (whose financial information is reported in Table 2 of CbC report) should be considered as 'related party revenue'.

² Section 286 of the Income-tax Act, 1961 read with Rule 10DB of the Income-tax Rules, 1962

³ In table 2 of the CbC report

⁴ As defined in section 286(9)(d) of the Income-tax Act, 1961

- However, under the Indian tax laws, ‘related party revenue’ is defined as revenue from ‘associated enterprises’. Consequently, a situation may arise where an entity is not a CE of the MNE group but is an ‘associated enterprise’ under the Income-tax Act, 1961 (Act) and therefore requires reporting under Indian law.
- Against this backdrop, OECD has recommended that Indian tax laws should be made consistent with OECD’s guidance.

(iii) Limitation of local filing obligation:

- Indian tax laws⁵ require the Indian CE of a foreign headquartered MNE group to file CbC report in India in the absence of an agreement providing for exchange of CbC report between India and the country of residence of the ultimate parent entity of such CE.
- However, under the minimum standard, OECD had recommended that such filing obligation should be limited to cases where there was an international agreement between the two jurisdictions but there was no qualifying CAA in effect between these jurisdictions by the time for filing the CbC report.
- OECD has recommended India to restrict local filing, highlighting that Indian law may impose local filing obligation even in cases where there is no international agreement in place between India and the jurisdiction of residence of the ultimate parent entity.

(iv) No local filing obligations in case of surrogate filing

- India does not impose local filing obligation in case of surrogate filing in another jurisdiction, which is in line with OECD’s terms of reference.

(v) Effective implementation

- OECD has observed that India has sufficient notification and penalty mechanisms in place to enforce compliance.

• **Exchange of information framework**

Given the evolving information exchange framework in India, OECD has observed that India meets the terms of reference in this respect.

• **Confidentiality and appropriate use of CbC reports**

OECD has recommended India to take steps to ensure that the ‘appropriate use’ conditions are met before the first exchange of CbC reports in 2018.

⁵ Section 286 of the Income-tax Act, 1961

Our comments

The peer review report provides an overview of differences existing between the domestic legislation of various countries vis-à-vis the requirements laid down under OECD's BEPS Action 13 and related guidance. The peer review process and the resulting recommendations given by OECD will help countries to implement consistent CbC reporting requirements. Considering India's commitment to the BEPS project, the Indian Government's reaction to OECD's recommendations and the steps taken towards implementing them will be keenly awaited.

Contact us

To know more, please visit www.grantthornton.in or contact any of our offices as mentioned below:

NEW DELHI National Office Outer Circle L 41 Connaught Circus, New Delhi 110001 T +91 11 4278 7070	NEW DELHI 6th floor, Worldmark 2, Aerocity, New Delhi – 110037 T +91 11 4952 7400	AHMEDABAD 7th Floor, Heritage Chambers, Nr. Azad Society, Nehru Nagar, Ahmedabad - 380015	BENGALURU 5th Floor, 65/2, Block A, Bagmane Tridib, Bagmane Tech Park, C V Raman Nagar, Bengaluru – 560093 T+91 80 4243 0700	CHANDIGARH B-406A, 4th Floor, L&T Elante office Industrial area, Phase-I Chandigarh 160002 T +91 172 4338 000
CHENNAI 7th Floor, Prestige Polygon 471, Anna Salai, Teynampet Chennai - 600 018 T +91 44 4294 0000	GURGAON 21st Floor DLF Square, Jacaranda Marg, DLF Phase II, Gurgaon 122002 T +91 124 462 8000	HYDERABAD 7th Floor, Block III White House Kundan Bagh, Begumpet Hyderabad 500016 T +91 40 6630 8200	KOCHI 7th Floor, Modayil Centre Point, Warriam road junction, M.G. Road Kochi 682016 T +91 484 406 4541	KOLKATA 10C Hungerford Street 5th Floor, Kolkata 700017 T +91 33 4050 8000
MUMBAI 16th Floor, Tower II Indiabulls Finance Centre SB Marg, Elphinstone (W) Mumbai 400013 T +91 22 6626 2600	MUMBAI 9th Floor, Classic Pentagon, Nr Bisleri, Western Express Highway, Andheri (E) Mumbai 400099 T +91 22 6176 7800	NOIDA Plot No. 19A, 7th Floor Sector – 16A, Noida 201301 T +91 120 7109 001	PUNE 3rd Floor, Unit No 309 to 312, West Wing, Nyati Unitree Nagar Road, Yerwada Pune- 411006 T +91 20 6744 8800	

For more information or for any queries, write to us at contact@in.gt.com



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