KPMG
cutting through complexity

12 June 2015

OECD/G20 BEPS Action Plan 13: Country-by-Country Reporting Implementation Package

A. Background

September 2014 Report:

The September 2014 Report on Action Plan 13 (the 'September 2014 Report') of the OECD[1]/G20 BEPS action plan on Transfer Pricing documentation proposed a 3-tier documentation consisting of Master-file, Local-file and Country-by-Country (CbyC) Report. This report has substituted Chapter V of the 2010 OECD TP Guidelines[2]. The CbyC report provides a template for Multinational Enterprises (MNEs) to report annually for each tax jurisdiction in which they do business, the information set out therein. All the OECD countries and various other G20 and developing countries, including India, have accepted the September 2014 report and agreed to implement the 3-tier documentation structure.

The CbyC Reports will be exchanged amongst all jurisdictions where a particular MNE groups' operations exist, on the basis of the model competent authority agreements (CAA). The CbyC report represents one of the three tiers of the transfer pricing documentation and will provide tax administrations with relevant and reliable information to perform an efficient and robust transfer pricing risk assessment analysis, which was one of the objectives of the 3-tier documentation structure.

February 2015 Implementation guidance:

Following the publication and adoption of the 3-tier documentation structure in the September 2014 Report, further work had been undertaken in February 2015 with a view to defining:

1. the timing of preparation and filing of the CbyC Report,
2. the scope of MNEs, subject to CbyC Reporting,
3. the conditions underpinning the obtaining and use of the CbyC Report, and
4. the framework for government-to-government mechanisms to exchange CbyC Reports,

Apart from primary mechanism which required MNE groups' Ultimate Parent Entity to file a CbyC Report in their jurisdiction of tax residence a ***secondary mechanism*** for the filing of CbyC Reports was also prescribed, in case a jurisdiction of the groups' Ultimate Parent Entity failed to provide information to other jurisdictions due to any of the following reasons:

(a) The jurisdiction has not required CbyC Reporting from the Ultimate Parent Entity of such MNE group;

(b) No competent authority agreement has been agreed by the jurisdiction of the Ultimate Parent Entity in a timely manner under the current international agreements for the exchange of the CbyC Reports; or

(c) It has been established that there is a failure, on the part of the jurisdiction of the Ultimate Parent Entity to exchange the information in practice with another jurisdiction after agreeing to do so.

B. June 2015 CbyC reporting implementation package

OECD acknowledged that developing countries may require support for the effective implementation of CbyC reporting. In order to provide such support an

[1] Organisation of Economic Co-operation and Development
[2] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations – July 2010

Implementation Package on CbyC Reporting (CbyC Implementation Package) has now been issued, that consists of:

(i) **Model legislation** which could be adopted by countries to require the Ultimate Parent Entity of an MNE group to file the CbyC Report in its jurisdiction of residence including backup filing requirements; and

(ii) Three model Competent Authority Agreements (CAAs) that could be used to facilitate implementation of the exchange of CbyC Reports, respectively based on the a) Multilateral Convention on Administrative Assistance in Tax Matters, b) bilateral tax conventions and c) Tax Information Exchange Agreements (TIEAs).

These have been explained in the ensuing sections here under.

It is important to note that on 4 June 2015 India alongwith Australia, Canada, Chile, Costa Rica, Indonesia and New Zealand joined the Multilateral Competent Authority Agreement (MCAA), bringing up the total number of jurisdictions to have signed the MCAA to 61[3]. The MCAA implements the Standard for Automatic Exchange of Financial Information in Tax Matters, developed by the OECD and G20 countries and presented in 2014.

Till date, 94 jurisdictions have committed to implement the above standard, agreeing to launch the first automatic information exchanges in 2017 or 2018.

I. Model legislation

The Model legislation that forms a part of the CbyC Reporting Implementation Package provides for the following:

- 13 Important definitions for terms like MNE Group, Excluded MNE, Ultimate Parent Entity, Surrogate Parent Entity, Constituent entity, etc. The same has been provided in **Exhibit 1** provided at the end of this document.
- Description of the filing obligations by either Ultimate Parent Entity or Constituent entity or Surrogate Parent Entity
- Timing of notifying the respective tax administration with information about which entity of the MNE group would be filing the CbyC report
- Information to be captured in the CbyC report
- Time limit for the filing of the CbyC report
- Provisions relating to use and confidentially of the information provided in the CbyC report, by the tax administrations
- Penalties – proposed to be prescribed by each jurisdiction in line with their existing transfer pricing documentation penalty regime
- Effective date of the CbyC reporting standard

The above Model legislation can be adopted by all jurisdictions in order to introduce and implement the 3-tier TP documentation structure that will be a common standard for all the OECD countries and those countries (like India) that are signatories to the September 2014 report. All jurisdictions are expected to follow the Model legislation into their own legal systems and make changes to their current legislation as may be required. We have described some important features of the Model legislation herein below:

1. Filing Obligation

(a) The Ultimate Parent Entity of an MNE Group shall file a CbyC report with the tax administration of its residence, in the CbyC report template (provided as Exhibit 2 herein below) with respect to the fiscal year under question within 12 months of the end of the fiscal year.

(b) Alternatively, a Constituent Entity which is not the Ultimate Parent Entity of an MNE Group shall file a CbyC Report on similar lines, if the following criteria are satisfied:

(i) the entity is resident for tax purposes in [Country X]; and

(ii) one of the conditions specified for the secondary mechanism [as per para A(4) above] for filing of a CbyC report becomes applicable.

(c) In the event one or more Constituent Entities become responsible for filing of CbyC report based on the criteria in (b) above, the MNE Group may designate one of such Constituent Entities to file the CbyC Report with respect to any Reporting Fiscal Year and notify its tax administration accordingly.

[3] www.oecd.org

(d) If a Surrogate Parent Entity files the CbyC Report with the tax authority of its jurisdiction of tax residence on or before the specified date and satisfies the following conditions, then the constituent entity, as aforesaid, shall not be required to file a CbyC Report:

(i) the jurisdiction of tax residence of the Surrogate Parent Entity requires filing of CbyC reports conforming to the CbyC report template (provided as Exhibit 2 herein below);

(ii) the jurisdiction of tax residence of the Surrogate Parent Entity has a Qualifying Competent Authority Agreement by the specified time for filing the CbyC Report for the Reporting Fiscal Year;

(iii) the jurisdiction of tax residence of the Surrogate Parent Entity has not notified a failure or inability of the Surrogate Parent entity to file a CbyC report;

(iv) the jurisdiction has been notified by the Constituent Entity tax resident therein, that it is a Surrogate Parent Entity; and

(v) a notification has been provided to respective country's tax administrations about the identity and tax residence of Reporting Entity.

2. Use And Confidentiality Of CbyC Report Information

As recommended in the September 2014 Report, the respective Country Tax Administration shall use the CbyC Report information for the purpose of assessing high-level transfer pricing risks and other base erosion and profit shifting (BEPS) related risks in their respective countries, including assessing the risk of non-compliance by members of the MNE Group with applicable transfer pricing rules, and where appropriate for economic and statistical analysis. The Model legislation also prescribes that the transfer pricing adjustments shall not be based on the CbyC Report.

The Model legislation shall be made effective in all countries post 1 January 2016 (i.e. from the tax year starting on or after 1 January 2016).

II. Competent authority agreements

Considering the advantages of the automatic exchange of information by means of a Multilateral Competent Authority Agreement (MCAA), in terms of both time and resource efficiency, it has been recommended that MCAAs could be used for the purpose of putting the automatic exchange of information in relation to CbyC Reports as well.

Therefore, the CbyC MCAA has been developed and proposed for the Exchange of CbyC Reports. In addition, two further model competent authority agreements have been developed and proposed for exchanges of CbyC Reports, one for exchanges under Double Tax Conventions (DTC) and one for exchanges under Tax Information Exchange Agreements (TIEA).

A template for each of the aforesaid agreement has been provided in the present CbyC Implementation Package which may serve as a basis on which each of the countries can draft the respective agreements for automatic exchange of information with the other country.

The purpose of the CbyC MCAA is to set forth rules and procedures for Competent Authorities of jurisdictions implementing the 3-tier documentation structure to automatically exchange CbyC Reports prepared by the Reporting Entity of an MNE Group and filed on an annual basis.

In Section 3 of the CbyC MCAA, the DTC CAA, and the TIEA CAA, the OECD describes the proposed timeline for exchange of the CbyC report between Competent Authorities. Specifically in the first year, the CbyC reports will be exchanged by Competent Authorities no later than 18 months after the last day of the Reporting Entity's fiscal year-end and in subsequent fiscal years, no later than 15 months after the last day of the Reporting Entity's fiscal year-end. Thus for a Reporting Entity with a 31 December year-end, the Reporting Entity must file the CbyC report for the 2016 fiscal year by 31 December 2017, and the Competent Authorities will exchange the 2016 CbyC report no later than June 2018. The 2017 CbyC report must be exchanged no later than March 2019.

This CbyC Implementation Package has intended to develop an XML schema and a related User Guide with a view to accommodating the electronic exchange of CbyC Reports.

Our comments

The Model legislation will be effective in all countries, including India, post 1 January 2016 (i.e. from the tax year starting on or after 1 January 2016). For India it would be applicable from 1 April 2016 i.e. Financial Year 2016-17.

It would therefore be important to understand what these developments mean for companies incorporated in India that are headquartered in India itself or have their headquarters in some overseas jurisdictions.

For India headquartered companies it is important to note that the Model legislation on CbyC reporting, will be soon adopted in the Indian TP regulations. Any such company with a total consolidated group revenue equal to or higher than INR5,250 crore in January 2015 will be required to prepare and file a CbyC report with the Indian tax authorities. All India headquartered companies meeting the above criteria should identify their reporting obligations and plan to meet such obligations in a timely manner.

Other Indian companies which have their headquarters in overseas jurisdictions should also be aware of the nuances of the CbyC reporting standard and should update themselves about which entity in the group will be filing the CbyC report. They should be aware that the information in the CbyC Report will be shared amongst all the jurisdictions in which the MNE has operations. Hence, while preparing their economic analysis, they should have a global perspective and not an India-centric view.

We recommend MNEs to start analysing their legal and operational structures. It is imperative to align the taxable outcomes of their current profit allocations in various jurisdictions with the extent of operational risks. One needs to ignore the legal contracts and legal entity structures which currently exist and use a Key Entrepreneurial Risk Taking (KERT) or Significant People Functions (SPF) analysis instead. In other words, apply 'substance over form' test. It is important to have meaningful open discussions within the management of the company and with the help of experts and consultants, help ensure alignment of income allocation with the actual functional profile of the entities of the group.

Exhibit 1

Some of the important terms defined in the Model legislation related to the CbyC reporting are as under:

(i) '**Group'** - means a collection of enterprises related through ownership or control such that it is either required to prepare Consolidated Financial Statements for financial reporting purposes under applicable accounting principles or would be so required if equity interests in any of the enterprises were traded on a public securities exchange.

(ii) '**MNE Group'** means any Group that:

a. includes two or more enterprises the tax residence for which is in different jurisdictions, or includes an enterprise that is resident for tax purposes in one jurisdiction and is subject to tax with respect to the business carried out through a permanent establishment in another jurisdiction, and

b. is not an Excluded MNE Group.

(iii) '**Excluded MNE Group'** means, with respect to any Fiscal Year of the Group, a Group having total consolidated group revenue of less than [750 million Euro] / [equivalent to INR5250 crores[4] as of January 2015] during the Fiscal Year immediately preceding the Reporting Fiscal Year as reflected in its Consolidated Financial Statements for such preceding Fiscal Year.

(iv) '**Constituent Entity'** means :

a. any separate business unit of an MNE Group that is included in the Consolidated Financial Statements of the MNE Group for financial reporting purposes, or would be so included if equity interests in such business unit of an MNE Group were traded on a public securities exchange;

b. any such business unit that is excluded from the MNE Group's Consolidated Financial Statements solely on size or materiality grounds; and (iii) any permanent establishment of any separate business unit of the MNE Group included in (i) or (ii) above provided the business unit prepares a separate financial statement for such permanent establishment for financial reporting, regulatory, tax reporting, or internal management control purposes.

(v) '**Reporting Entity'** means the Constituent Entity that is required to file a CbyC report conforming to the requirements in the CbyC reporting template (provided as Exhibit 1 to this document) in its jurisdiction of tax residence on behalf of the MNE Group. The Reporting Entity may be the Ultimate Parent Entity, the Surrogate Parent Entity, or any entity described in para A(4) above.

(vi) '**Ultimate Parent Entity'** means a Constituent Entity of an MNE Group that meets the following criteria:

a. it owns directly or indirectly a sufficient interest in one or more other Constituent Entities of such MNE Group such that it is required to prepare Consolidated Financial Statements under accounting principles generally applied in its jurisdiction of tax residence, or would be so required if its equity interests were traded on a public securities exchange in its jurisdiction of tax residence; and

b. there is no other Constituent Entity of such MNE Group that owns directly or indirectly an interest described in subsection (i) above in the first mentioned Constituent Entity.

[4] Exchange rate of 1 Euro = INR70 assumed

(vii) '**Surrogate Parent Entity'** means one Constituent Entity of the MNE Group that has been appointed by such MNE Group, as a sole substitute for the Ultimate Parent Entity, to file the CbyC Report in that Constituent Entity's jurisdiction of tax residence, on behalf of such MNE Group, when one or more of the conditions set out in para A(4) above applies.

(viii) '**Fiscal Year'** means an annual accounting period with respect to which the Ultimate Parent Entity of the MNE Group prepares its financial statements.

(ix) '**Reporting Fiscal Year'** means that Fiscal Year the financial and operational results of which are reflected in the CbyC report specified in the CbyC reporting template (provided as Exhibit 1 to this document).

(x) '**Qualifying Competent Authority Agreement'** means an agreement (i) that is between authorised representatives of those jurisdictions that are parties to an International Agreement and (ii) that requires the automatic exchange of CbyC Reports between the party jurisdictions.

(xi) '**International Agreement'** shall mean the Multilateral Convention for Mutual Administrative Assistance in Tax Matters, any bilateral or multilateral Tax Convention, or any Tax Information Exchange Agreement (TIEA) to which a country is a party, and that by its terms provides legal authority for the exchange of tax information between jurisdictions, including automatic exchange of such information.

(xii) '**Consolidated Financial Statements'** means the financial statements of an MNE Group in which the assets, liabilities, income, expenses and cash flows of the Ultimate Parent Entity and the Constituent Entities are presented as those of a single economic entity.

(xiii) '**Systemic Failure'** with respect to a jurisdiction means that a jurisdiction has a Qualifying Competent Authority Agreement in effect with a Country, but has suspended automatic exchange (for reasons other than those that are in accordance with the terms of that Agreement) or otherwise persistently failed to automatically provide to the said Country CbyC Reports in its possession of MNE Groups that have Constituent Entities in the that Country.

Exhibit 2

A model template for the Country-by-Country Report

Table 1. Overview of allocation of income, taxes and business activities by tax jurisdiction

Name of the MNE group: Fiscal year concerned:										
Tax Jurisdiction	Revenues			Profit (Loss) Before Income Tax	Income Tax Paid (on cash basis)	Income Tax Accrued – Current Year	Stated capital	Accumulated earnings	Number of Employees	Tangible Assets other than Cash and Cash Equivalents
	Unrelated Party	Related Party	Total							

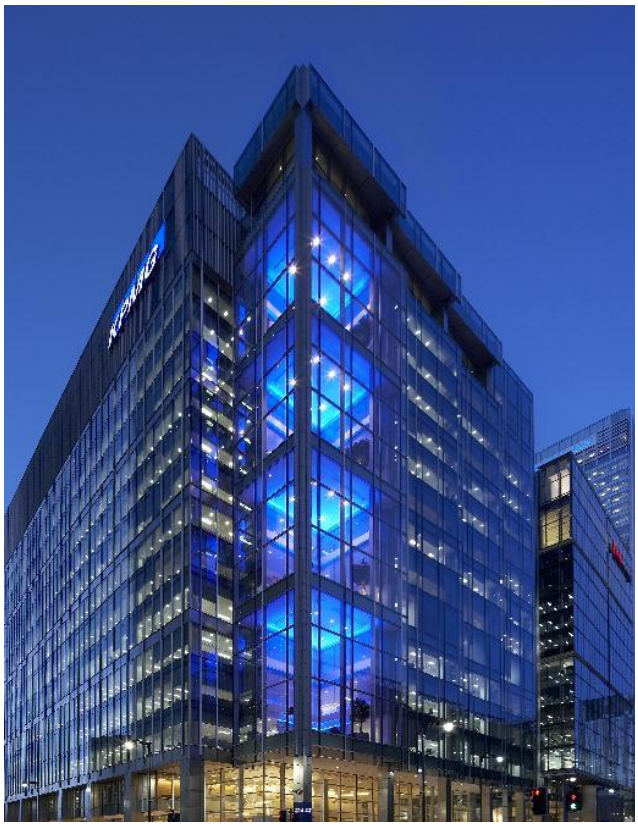
Table 2. List of all the Constituent Entities of the MNE group included in each aggregation per tax jurisdiction

Name of the MNE group: Fiscal year concerned:																
Tax Jurisdiction	Constituent Entities resident in the Tax Jurisdiction	Tax Jurisdiction of organisation or incorporation if different from Tax Jurisdiction of Residence	Main business activity(ies)													
			Research and Development	Holding or Managing intellectual property	Purchasing or Procurement	Manufacturing or Production	Sales, Marketing or Distribution	Administrative, Management or Support Services	Provision of Services to unrelated parties	Internal Group Finance	Regulated Financial Services	Insurance	Holding shares or other equity instruments	Dormant	Other[2]
	1.														
	2.														
	3.														
	1.														
	2.														
	3.														

[2] Please specify the nature of the activity of the Constituent Entity in the "Additional Information" section.

Table 3. Additional Information

Name of the MNE group: Fiscal year concerned:
Please include any further brief information or explanation you consider necessary or that would facilitate the understanding of the compulsory information provided in the country-by-country report.



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