

Insertion of Transfer Pricing Clauses in Tax Audit Report ('TAR') for Financial Year ('FY') 2017-18

Assessee's who enter into Specified Domestic Transactions (**SDT's**)/ International Transactions with related parties/ Associated Enterprises (**AE's**) must furnish the said details and independent CA certificate in Form 3CEB. However, the Govt. of India vide Notification No. 33/2018 (CBDT) has amended/ inserted some of Clauses pertaining to Transfer Pricing positions and its relevant disclosures in Form 3CD (Tax Audit Report). The said amendments shall come into effect from 20th August 2018 and these are applicable from FY 2017-18 onwards wherein the Chartered Accountant (CA) must comment upon the applicability of the amended clauses.

The following are the amendments w.r.t. Transfer Pricing provisions.

1) Addition of New clause 30A in Form 3CD:

Amendment made in TAR

Following disclosures to be made:

- Whether there has been a primary adjustment during the year, category & amount of primary adjustment made.
- Whether the excess money available is required to be repatriated to India and if yes, whether the excess money has been repatriated to India within the prescribed time limit.
- if the excess money is not repatriated to India within the prescribed time, amount of imputed interest on such deemed advance.

Analysis and Background

Finance Act 2017 introduced Secondary Adjustment provisions which triggers in a case there is a primary transfer Pricing Adjustment (voluntary TP adjustment in case of non arms length transactions) under the prescribed scenarios. In a case where due to a primary adjustment (when primary adjustments exceed 1 Crore) in the hands of the taxpayer, there results an excess cash with taxpayer's Associated Enterprise (AE) outside India, such excess cash is required to be repatriated to India within the prescribed time limit i.e., 90 days from the date of filing return of income (ROI). In case where the excess money is not repatriated to India within the prescribed time, such amount is deemed to be an advance made by the taxpayer to its AE and interest is levied on the deemed advance in a prescribed manner until repatriation of the money to India.

The interest rate will be as follows:

- For an international transaction denominated in INR – One year marginal cost of fund lending rate of State Bank of India as on 1st of April of the relevant previous year plus 325 basis points
- For an international transaction denominated in foreign currency – Six month LIBOR as on 30th September of the relevant previous year plus 300 basis points.

2) Addition of New clause 30B in Form 3CD:

Amendment made in TAR

- Accountant to certify details of expenditure incurred by way of interest or similar nature, EBIDTA of the relevant year, quantum of interest expenditure or similar nature which exceeds 30% of EBDITA, & unclaimed interest expenditure eligible for carry forward to subsequent year.

Analysis and Background

Pursuant to BEPS Action 4 recommended by OECD, Finance Act 2017 inserted a new provision which limits interest deduction or similar payments made by Indian company / permanent establishment of foreign company for debt borrowed from or guaranteed by non-resident AE. The provision applies if interest or similar payments exceeds INR 10 million in which case, interest deduction is limited to lower of actual expenditure in favour of AE or 30% of Earnings before interest depreciation, tax and amortization (EBIDTA).

3) Addition of New clause 43(a) in Form 3CD:

Amendment made in TAR

- Accountant to report whether the taxpayer or its parent entity or alternate reporting entity is liable to furnish the CbC report and if yes, particulars relating to furnishing of such report.

Analysis and Background

Typically, CbC report is applicable for all the entities whose consolidated group turnover exceeds Rs. 5,500 Crores. A single entity shall file CbC Report on behalf of the entire Group. Further, CbC reporting provisions requires Multi National Entities (MNEs) to report:

- Amount of revenue (related and unrelated party),
- Profits, income tax paid and taxes accrued, employees, stated capital and retained earnings, and
- Tangible assets annually for each tax jurisdiction in which they do business.

In addition, MNE's are also required to identify each entity within the group doing business in a particular tax jurisdiction and to provide an indication of the business activities each entity conducts.

This information is to be made available to the tax authorities in all jurisdictions in which the MNE operates. The overall TP documentation requirement follows a 3-tier approach: CbC Report, Master File, Local File. CbC Report shall be filed in Form 3CEAD if an entity crosses the abovementioned thresholds. However, if the said report has already been filed by any other entity on behalf of the entire group then, Indian entity shall file Form 3CEAC stating the name of the entity which has already filed the CbC report on behalf of the entire group.

Concluding remarks:

Please note that auditor shall comment on the applicability of the Clauses to the entity while furnishing the Form 3CD. These insertions/ amendments are made in line with BEPS Action Points and recommendations. This provides additional disclosure liability to the assessee's, and at the same time it also provides a close watch on the TP aspects (all the recent developments) which are monitored closely by the governments across the globe.