

# Deloitte Haskins & Sells LLP



**JB Nagar CPE Study Circle**  
The Changing Global Dynamics and  
Planning Opportunities  
CA Rakesh Alshi– 15 October 2017

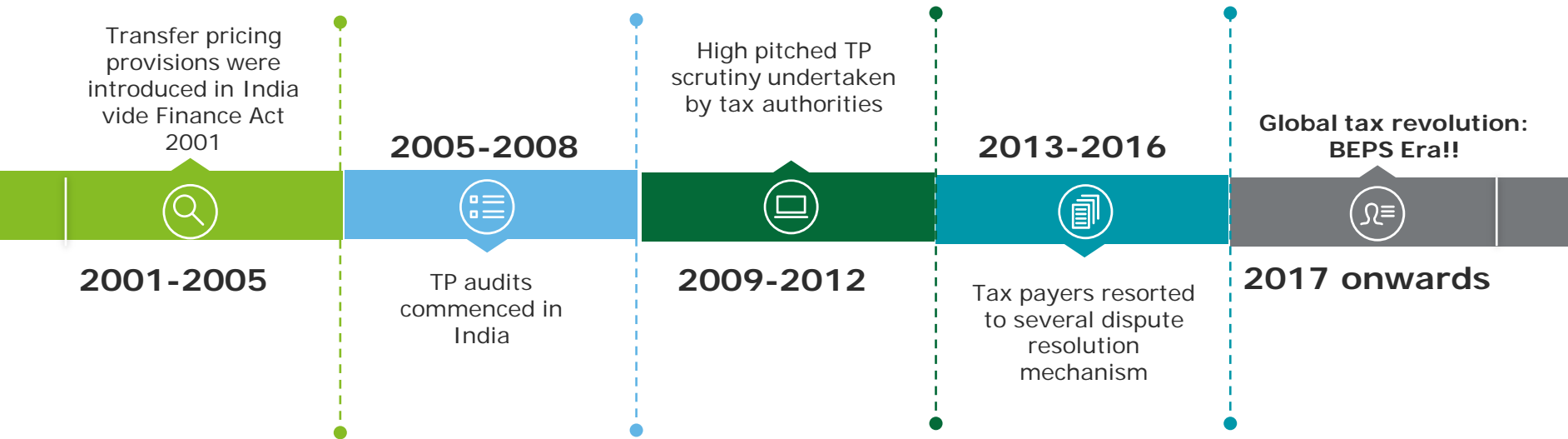
# Agenda

- Evolution of Transfer Pricing in India
- Base Erosion and Profit Shifting – Action Plan 13
- Multilateral Instrument
- Recent developments in transfer pricing
  - Risk based audit procedures
  - Introduction of secondary adjustment
  - Intra-group charges payout
  - Limitation of interest deduction in certain cases
  - Revised Safe Harbour rules
  - Other Amendments
- Way Forward



# Evolution of Transfer Pricing in India

Story so far...





# Transfer Pricing updates - India

## Chandra's Mantra: Plan to prune portfolio, create new groups, support steel, motors & TCS , say Ta-Ta to 110 cos



“I will be the first to admit that we are very complex. We need to be simplified. I would like to see ourselves as 5,6,7 groups as opposed to 110 companies. The more we see ourselves as (many companies), nothing will get done, Tata Sons chairman N Chandrsekaran said in an interview to ET on Sunday.”



# BEPS – Action Plans

Action 1: Address the tax challenges of the digital economy			
“Gaps”	“Frictions”		“Transparency”
i. Establishing international coherence of corporate income taxation	ii. Restoring the full effects and benefits of international standards		iii. Ensuring transparency while promoting increased certainty and predictability
<b>Action 2:</b> Neutralize the effects of hybrid mismatch arrangements	<b>Action 6:</b> Prevent treaty abuse		<b>Action 11:</b> Establish methodologies to collect and analyze data on BEPS and the actions to address it
<b>Action 3:</b> Strengthen controlled foreign company (CFC) rules	<b>Action 7:</b> Prevent the artificial avoidance of PE status		<b>Action 12:</b> Require taxpayers to disclose their aggressive tax planning arrangements
<b>Action 4:</b> Limit base erosion via interest deductions and other financial payments	Assure that transfer pricing outcomes are in line with value creation	<b>Action 8:</b> Intangibles	<b>Action 13:</b> Re-examine transfer pricing documentation
<b>Action 5:</b> Counter harmful tax practices more effectively, taking into account transparency and substance		<b>Action 9:</b> Risk and capital	<b>Action 14:</b> Make dispute resolution mechanisms more effective
		<b>Action 10:</b> Other high-risk transactions	
<b>Action 15: Develop a multilateral instrument</b>			

# Base Erosion and Profit Shifting (BEPS) Action Plan 13

## Three tier documentation

- ***Three tier documentation introduced by Action 13 of the BEPS***
  - CbC Reporting – where the annual turnover of the Group is above 750 million Euro - Key financial information on all group members on an aggregate country basis for each member
  - Master file - Key information about the group's global operations including a high-level overview of a company's business operations along with important information on a company's global transfer pricing policies with respect to intangibles and financing
  - Local file - Information and support of the intercompany transactions that the local company engages in with related parties
- CbC Reporting to be used as a risk assessment tool by tax authorities worldwide
- Local file has additional requirements as compared to the TP documentation maintained by the companies in India

# Base Erosion and Profit Shifting (BEPS) Action Plan 13

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# CbC Report

## Overview



### Applicability

- Indian head-quartered International Group (IG) meeting the prescribed threshold to file CbC Report in India
- Indian constituent entity of IG head-quartered overseas (foreign IG) also required to file CbC Report in India under specified circumstances or if appointed as the alternate reporting entity



### Threshold

- The memorandum to Finance Bill 2016, indicated the threshold as INR equivalent of Euro 750 million, prescribed under Action 13
- The Act provided that CbC reporting threshold would be prescribed
- The draft rules now prescribe consolidated group revenue in excess of INR 55,000 million in the preceding year



### Contents

- The format of the CbC report aligned with BEPS Action 13 model template
- Definitions of the data points are identical to the original definitions provided under the Action 13 guidance (released in October 2015)
- Additional implementation guidance on various aspects (aggregation, data definitions, applicability for investment funds, etc.) provided by OECD were not considered in the draft rules



### Manner of submission

- CbC Report required to be filed in Form No. 3CEBC
- Form No. 3CEBC to be filed electronically with the Director General of Income-tax (Risk Assessment)



### Due date

- By the due date for filing the income-tax return i.e. 30 November following the financial year - expected to be extended

# CbC Report

## Contents of Form No. 3CEBC – Similar to Action 13 template

### Part A: Information included in CbC for each tax jurisdiction

Revenues (related, unrelated, total)	Profit/loss before income tax
Income tax paid (on cash basis)	Income tax accrued (Reportable accounting year)
Stated capital	Accumulated earnings
Number of employees	Tangible assets other than cash and cash equivalents

### Part B: Information included in CbC – for each tax jurisdiction

Tax Jurisdiction of organization or incorporation if different

Main business activity of each of the entity

#### Main business activity(ies)

- Research and development
- Holding or managing intellectual property
- Purchasing or procurement,
- Manufacturing or production
- Sales, marketing or distribution
- Provision of services to unrelated parties
- Internal Group Finance
- Regulated Financial Services
- Insurance
- Holding shares or other Equity instruments,
- Dormant
- Others

### Part C:

To include any further brief information or explanation that taxpayer may consider necessary or that would facilitate the understanding of the compulsory information provided in the CbC Report.


# List of signatories to the Multilateral Competent Authority Agreement


As on 6 July 2017, 65 countries **including India** are signatories to the MCAA on exchange of CBC reports. India has however not activated the MCAA in relation to any of the other signatories.


S. No.	Country	S. No.	Country	S. No.	Country	S. No.	Country
1	Argentina	18	Estonia	35	Japan	52	Poland
2	Australia	19	Finland	36	Jersey	53	Portugal
3	Austria	20	France	37	Korea	54	Russian Federation
4	Belgium	21	Gabon	38	Latvia	55	Senegal
5	Belize	22	Georgia	39	Liechtenstein	56	Singapore
6	Bermuda	23	Germany	40	Lithuania	57	Slovak Republic
7	Brazil	24	Greece	41	Luxembourg	58	Slovenia
8	Canada	25	Guernsey	42	Malaysia	59	South Africa
9	Cayman Islands	26	Haiti	43	Malta	60	Spain
10	Chile	27	Hungary	44	Mauritius	61	Sweden
11	Costa Rica	28	Iceland	45	Mexico	62	Switzerland
12	Colombia	<b>29</b>	<b>India</b>	46	Netherlands	63	Turks and Caicos Islands
13	Croatia	30	Indonesia	47	New Zealand	64	United Kingdom
14	Curaçao	31	Ireland	48	Nigeria	65	Uruguay
15	Cyprus	32	Isle of Man	49	Norway		
16	Czech Republic	33	Israel	50	Pakistan		
17	Denmark	34	Italy	51	Peoples Republic of China		


# Master File requirements


## Overview

-  **Applicability**
  - Part A – Every constituent entity of an IG having international transactions / specified domestic transactions
  - Part B – Every constituent entity of an IG meeting the prescribed threshold

-  **Contents**
  - Largely consistent with the BEPS Action 13 requirements
  - Few important additional data requirements introduced, requiring IGs to customize their Master File for India

-  **Submission**
  - Requirement to electronically file the Master File in Form No. 3CEBA with the Director General of Income-tax (Risk Assessment)
  - Master File is not a part of exchange mechanism (like the CbC Report), required to be filed locally in India by constituent entity in India

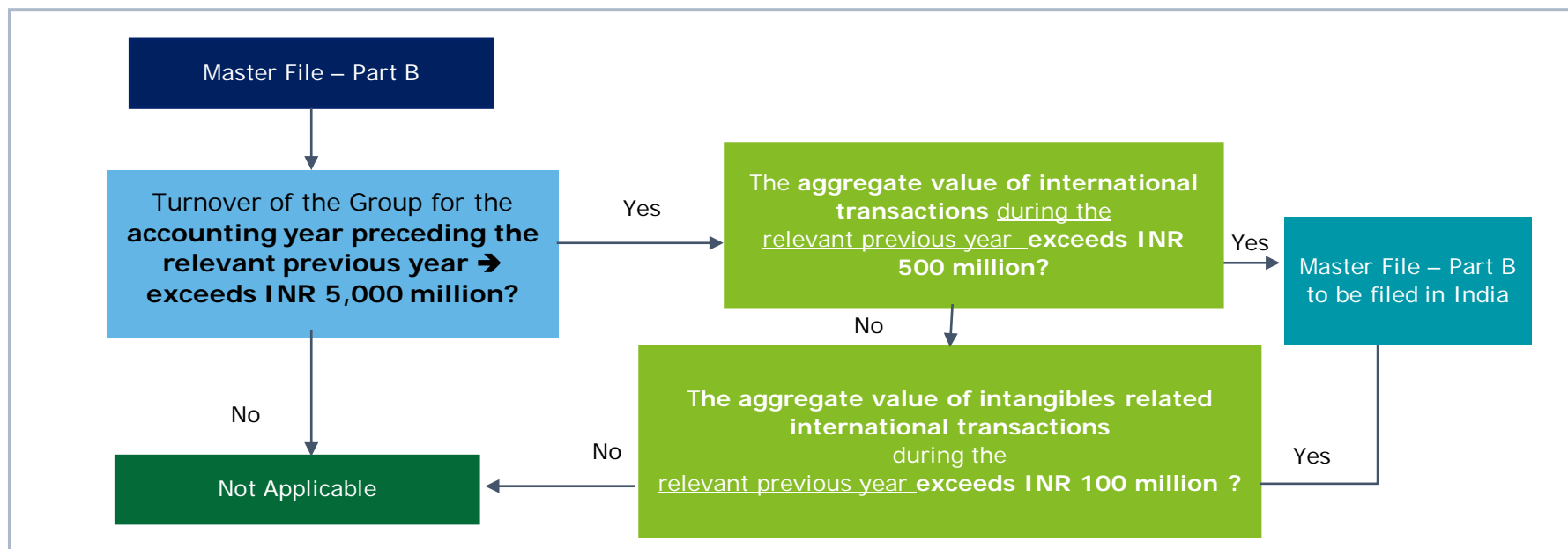
-  **Due date**
  - By the due date for filing the Indian income tax return of the Indian constituent entity (i.e. 30th November following the financial year)
  - For FY 2016-17 – Due date extended to 31 March 2018

-  **Option for filing one Master File**
  - IGs with multiple constituent entities in India can file one Master File on behalf of other Indian constituent entities of an IG
  - Requirement to notify the designated entity in Form No. 3CEBE
  - Form No. 3CEBE currently applicable only for foreign IGs – requires clarification

# Master File requirement

## Applicability and threshold

Part	Applicable to	Threshold
Part A	Every constituent entity of an IG having international transactions/specified domestic transactions	None
Part B	Every constituent entity of an IG that meets the threshold / criteria	<ul style="list-style-type: none"> <li>• In the preceding year, consolidated group revenue &gt; INR 5,000 million; and</li> <li>• The aggregate value of international transactions, as per books of accounts, for the reporting year :               <ul style="list-style-type: none"> <li>- exceeds INR 500 million, or</li> <li>- In relation to intangibles exceeds INR 100 million</li> </ul> </li> </ul>



# Indian Master File rules vs. Global implementation

- Much lower than the threshold provided by countries such as
  - Australia (Global revenue – Euro 685 million) and Japan (Global revenue – Euro 815 million)
  - Germany (Local entity revenue – Euro 100 million)
  - China (Related party transaction of local entity – Euro 130 million)
- Master File is required to be filed in India
  - Similar requirement for filing in countries such as Australia, Belgium, Japan, South Africa
  - whereas, various countries such as Austria, Netherland, Indonesia and Malaysia require only maintenance of Master File by the due date - filing is required at a later date, when called upon during transfer pricing audit (generally 30 days upon request)
- Due date for furnishing of Master File in India i.e. 8 months from the end of the financial year
  - Countries such as Australia, Belgium, South Africa, Japan require filing within 12 months from the end of the financial year
- Requirement to furnish information in addition to BEPS Action 13 Master File recommendation
  - Countries such as China, Germany, Indonesia, Italy, Poland, Slovakia, South Africa also require additional information

# Master File requirements

## Contents of Form No. 3CEBA - Part B of the Master File

Master File Requirement	Summary of OECD BEPS Requirement	Additional requirements as per Indian draft rules
<b>Organization structure</b>	<ul style="list-style-type: none"> <li>Chart illustrating IG's legal and ownership structure and geographical location of operating entities</li> </ul>	<ul style="list-style-type: none"> <li>Addresses of all operating entities of the IG</li> </ul>
<b>Description of IG's business</b>	<ul style="list-style-type: none"> <li>Description of important drivers of business profit</li> <li>Description of supply chain for the specified category of products</li> <li>Functional analysis of the principal contributors to value creation</li> </ul>	<ul style="list-style-type: none"> <li>Functions, assets and risk analysis of entities contributing at least 10% of the IG's revenue, assets and profits</li> </ul>
<b>IG's Intangibles</b>	<ul style="list-style-type: none"> <li>IG's strategy for ownership, development and exploitation of intangibles</li> <li>List of important intangibles with ownership</li> <li>Important agreements and corresponding transfer pricing policies in relation to R&amp;D and intangibles</li> </ul>	<ul style="list-style-type: none"> <li>Names and addresses of all entities of the IG engaged in development and management of intangibles</li> <li>Addresses of entities legally owning important intangibles and entities involved in important transfers of interest in intangibles</li> </ul>
<b>IG's intercompany financial activities</b>	<ul style="list-style-type: none"> <li>Description of how the IG is financed, including identification of important financing arrangements with unrelated lenders</li> <li>Identification of entities performing central financing function including their place of operation and effective management</li> </ul>	<ul style="list-style-type: none"> <li>Names and addresses of top ten unrelated lenders</li> <li>Names and addresses of entities providing central financing functions including their place of operation and effective management</li> </ul>

**Contents of Master File are largely consistent with the BEPS Action 13 requirements - Few important additional data requirements introduced requiring IGs to customize their Master File for India**

# Systems and safeguards

- **Procedure for filing**
  - Form Nos 3CEBA, 3CEBB, 3CEBC and 3CEBD have to be filed electronically
  - These forms are required to be filed with the Director General of Income-tax (Risk Assessment)
  - The procedure for filing shall be specified subsequently
  - Not specified whether the Form No. 3CEBE has to be filed electronically
- **CbC XML utility**
  - The XML utility for furnishing the CbC report in India is yet to be released
- **Systems and adequate safeguards for confidentiality**
  - Adequate safeguards to be implemented to protect the confidential (trade secrets, scientific secrets, etc.) and other commercially sensitive information received by way of the CbC report and the Master File
  - Appropriate security, archival and retrieval policies in relation to information furnished to be implemented by Principal Director General of Income-tax (Systems) or Director General of Income-tax (Systems)



# Penalties for non-compliance

Sr. No	Particulars	Default	Penalty
<b>CbC report</b>			
1.	Non-furnishing of CbC report by Indian parent or the alternate reporting entity resident in India	Each day up to a month from due date	<input type="checkbox"/> 5,000 per day
		Beyond a month from due date	<input type="checkbox"/> 15,000 per day
		Continuing default beyond service of penalty order	<input type="checkbox"/> 50,000 per day
2.	Non-submission of information	Beyond expiry of the period for furnishing information	<input type="checkbox"/> 5,000 per day
		Continuing default beyond service of penalty order	<input type="checkbox"/> 50,000 per day from date of service of penalty order
3.	Provision of inaccurate information in CbC report	Knowledge of inaccuracy at time of furnishing the report but fails to inform the prescribed authority	<input type="checkbox"/> 500,000
		Inaccuracy discovered after filing and fails to inform and furnish correct report within fifteen days of such discovery	
		Furnishing of inaccurate information or document in response to notice issued	
<b>Master File</b>			
1.	Non-furnishing of information and documentation	Failure to furnish the information and document to the prescribed authority	<input type="checkbox"/> 500,000

# Impact on Indian headquartered IGs

## CbC reporting requirement

- **Parent entity or the Alternate Reporting Entity** to file CbC report in India in Form No. 3CEBC
- File CbC report by the due date for filing the return of income i.e. 30 November following the end of the financial year
- May refer to OECD guidance in the absence of specific coverage in the Indian provisions

## Master File

- File Master File in India in Form No. 3CEBA in the following parts:
  - Part A of Master File : To be filed by every constituent entity of an IG having international or specified domestic transactions - no threshold
  - Part B of Master File : To be filed by every constituent entity of an IG that meets the prescribed threshold
- Filing a notification appointing a designated Indian constituent entity to file the Master File in India on behalf of all the Indian constituent entities – Whether option available to Indian headquartered IG's?
- File Master File by the due date for filing return of income. Extended to 31 March 2018 for FY 2016-17

# Impact on Foreign IGs

## CbC reporting requirement for Indian constituent entity

- File CbC report in India in Form No. 3CEBC if covered under the specified circumstances by the due date for filing the income tax return
- In case of multiple Indian constituent entities of a foreign IG required to file the CbC Report in India under the specified circumstances (other than being an alternate reporting entity), notify in Form 3CEBD the details of the entity designated to file the CbC report in India
- File CbC notification in Form No. 3CEBB at least 60 days prior to the due date for filing the CbC report

## Master File

- File Master File in India in Form No. 3CEBA in the following parts:
  - Part A of Master File : To be filed by every constituent entity of an IG having international or specified domestic transactions - no threshold
  - Part B of Master File : To be filed by every constituent entity of an IG that meets the prescribed threshold
- File Master File by the due date for filing return of income. Extended to 31 March 2018 for FY 2016-17
- File notification appointing a designated Indian constituent entity to file the Master File in India on behalf of all the Indian constituent entities, in Form No. 3CEBE, 30 days prior to due date for filing the Master File in India

# Recent Developments in Transfer Pricing



# Introduction of Secondary Adjustment (2/2)

The excess money available with the AE consequent to the primary adjustment, if not repatriated to India within the prescribed time, shall be deemed to be an advance made by the taxpayer

- **Prescribed time limit for repatriation:**

- In case of primary adjustment made by the Assessing Officer – within 90 days of the date of order
- In case of primary adjustment made in all other cases– within 90 days of due date of filing of tax return

Imputed per annum interest income on excess money which is not repatriated within the time limit

- Rupee denominated international transaction - One-year marginal cost of fund lending rate of SBI prevalent as on April 1st of the relevant previous year plus 325 basis points
- Foreign currency denominated international transaction - 6 month LIBOR as on September 30th of the relevant previous year plus 300 basis points

# Revised Safe Harbor Rules

- CBDT has released the revised safe harbour rules (the 'Rules') effective from Assessment Year (AY) 2017-18 and two subsequent years.
- The Safe Harbor rules has separate categorization of information technology enabled services (ITeS) and Knowledge Process Outsourcing (KPO) services
- The rates prescribed under these rules are different for ITeS and KPO, subject to specified criteria
- Specific definition of 'operating expense' provided under the safe harbor rules – to include reimbursements, recovery, ESOP cost etc.
- The safe harbor rates has been enclosed as **Annexure 1**.



# Other Amendments (1/3)

**Detailed definition of 'international transaction' which includes capital financing transactions** such as:

- Long-term or short term borrowing;
- Lending;
- Guarantee;
- Purchase or sale of marketable securities;
- Any type of advance, payments or deferred payment or receivable
- Any other debt arising during the course of business.

**Introduction of 'use of multiple year data' and 'range concept'**

- Amendment made in Rule 10B(4) and insertion of new sub-rule 10B(5) allowing multiple year to be used for comparability purposes
- Insertion of New Rule 10CA for adoption of range concept: -
  - The range concept is applicable when application of MAM results in more than one price;
  - It shall be used only in case the method used for determination of ALP is TNMM, RPM or CPM. Thus, this concept is not applicable in case of Profit Split method and Any Other Method; and
  - A minimum of six entities are required to be selected as comparable of tested party;

# Other Amendments (2/3)

## Specified Domestic Transaction

- Finance Act, 2012 extended the TP provisions to SDT wherein, the tax payers having aggregate specified domestic transactions as mentioned below in excess of INR 5 crore (now increased to INR 20 crores) in a previous year would need to comply with transfer pricing provisions.
  - Expenditure for which payment is made or to be made to domestic related parties (Finance Act 2017 has excluded the said transaction w.e.f. 1-4-2017)
  - Tax Holiday/ Deductions claimed by the taxpayer
    - Transfer of goods or services between various businesses of same taxpayer
    - More than ordinary profits derived from transactions with closely connected persons

## Deemed International Transaction

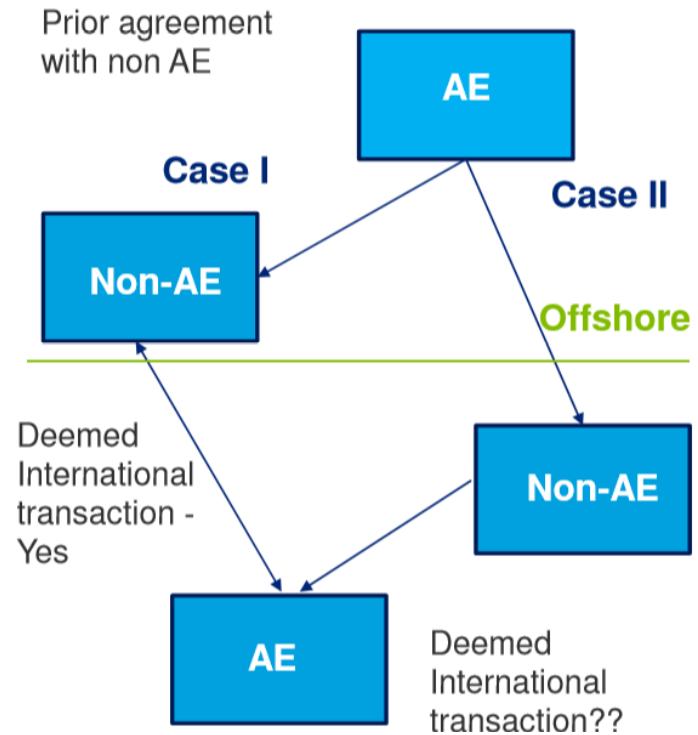
- The erstwhile definition of 'deemed international transaction' led to a doubt whether or not, for the transaction to be treated as an international transaction, the unrelated person should also be a non-resident.
- Therefore, Section 92B(2) of the Act was amended to provide that where, in respect of a transaction entered into by an enterprise with a person other than an associated enterprise, there exists a prior agreement in relation to the relevant transaction between the other person and the associated enterprise or, where the terms of the relevant transaction are determined in substance between such other person and the associated enterprise, and either the enterprise or the associated enterprise or both of them are non-resident, then such transaction shall be deemed to be an international transaction entered into between two associated enterprises, whether or not such other person is a non-resident



# Other Amendments (3/3)

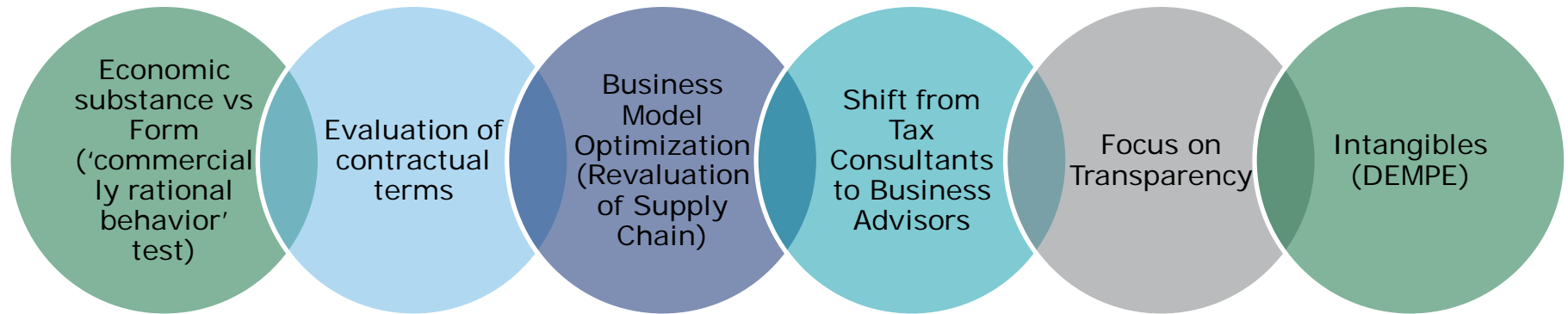
## Rationalization of definition

- A transaction entered into by an enterprise with a third party is deemed to be a covered transaction, if
  - There exists a prior agreement between such third party and the AE, or;
  - The term of the transaction is determined in substance between such third party and the AE.
- Whether transaction with resident third party in such cases covered under the ambit of the TP?



# Way Forward

Re-defining the traditional mindset



# Substance over form



**Questions & Answers**



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Thank You





# Annexure 1