

Implementation Guide
w.r.t. Notification No. 33/2018
dated 20.7.2018
effective from 20.8.2018



Direct Taxes Committee
The Institute of Chartered Accountants of India
(Set up by an Act of Parliament)
New Delhi

Implementation Guide
w.r.t. Notification No. 33/2018 dated
20.07.2018 effective from 20.08.2018



Direct Taxes Committee
The Institute of Chartered Accountants of India
(Set up by an Act of Parliament)
New Delhi

© THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA, NEW DELHI

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form, or by any means, electronic, mechanical, photocopying, recording otherwise, without the prior permission, in writing, from the publisher.

First Edition : August, 2018

Committee / Department : Direct Taxes Committee

E-mail : dtc@icai.in

Website : www.icai.org

Published by : Direct Taxes Committee of ICAI, "ICAI Bhawan", Plot No- A- 29, Sector- 62, NOIDA, Dist: Gautam Budh Nagar, Uttar Pradesh PIN- 201309

Foreword

Recently, the CBDT vide Notification No. 33/2018 dated 20th July, 2018 has made revisions to Form No. 3CD wherein it requires additional requirements to be reported. The additional inclusions in the said form has increased the scope of tax audit significantly and requires various additional procedures to be performed with due diligence before reporting on these additional requirements.

The Institute of Chartered Accountants of India (ICAI) as a partner in nation building is always ready to understand and implement the changes in laws concerning the fraternity and does so at the earliest and enables its members to be fully geared up to implement the changes and stand besides the stakeholders including tax payers.

I am glad that in view of the importance of the matter the Direct Taxes Committee of ICAI has proactively taken an initiative of bringing out the “Implementation Guide on the Amendments made vide Notification No. 33/2018 dated 20th July, 2018” by the CBDT and effective from 20th August, 2018 to enable the stakeholders and our members to implement the changes in the best possible manner in the available time.

I would like to compliment CA. Tarun Jamnadas Ghia, Chairman Direct Taxes Committee, who contributed to this project and provided his valuable unstinted efforts in bringing out the said publication.

I am confident that the team work of co-authors CA. Gautam Nayak, CA. Sanjeev Pandit and CA. Tarun Jamnadas Ghia will prove to be quite useful to the fraternity & stakeholders and will add to the goodwill of the ICAI. Moreover, I wish to acknowledge valuable inputs provided by CA. Sanjay Agarwal, Central Council Member, ICAI and CA. Avinash Rawani in bringing this Implementation Guide in such a short span of time.

I would like to appreciate the efforts made by the Direct Taxes Committee of ICAI and hope to keep up the good work of enhancing the knowledge & expertise of the members in the field of taxation

Date: 22nd August, 2018
Place: New Delhi

CA. Naveen N.D. Gupta
President, ICAI

Preface

The Central Board of Direct Taxes, vide Notification No. 33/2018/F No. 370142/9/2018-TPL dated 20th July 2018, notified amendments to Form No. 3CD enhancing substantially the reporting requirements and the role of tax auditor as various new clauses/sub clauses have been inserted, major amendments have been made and additional disclosures are to be reported.

In July 2014, the CBDT had amended the formats of tax audit reports, thereby expanding the scope of tax audit. Since significant changes were made in the format of tax audit reports for which members were to be guided, the Direct Taxes Committee of ICAI had issued the Seventh Edition of the Guidance Note on Tax Audit u/s 44AB of the Income-tax Act, 1961 in the year 2014.

Afterwards, various changes were made in the Tax Audit Form by the CBDT in the year 2016 & 2017 which are yet to be incorporated in the Guidance Note on Tax Audit u/s 44AB of the Income-tax Act, 1961. As the revision of the Guidance Note on Tax Audit requires substantial time and efforts, while the notification dated 20th July 2018 became effective in a short period of time from 20th August 2018, therefore, the Direct Taxes Committee of the ICAI decided to bring out at the earliest an implementation guide with respect to the notification dated 20th July 2018. In the meantime, vide Circular No. 6 of 2018 dated 17th August 2018 two of the clauses included in notification dated 20th July 2018 were kept in abeyance till 31st March 2019.

This Implementation Guide is, therefore, in respect of amendments made in Form No. 3CD vide Notification No. 33/2018, dated 20th July 2018 and made effective from 20th August 2018.

We are confident that this Implementation Guide would assist the members & will help them in discharging their professional obligations with more efficacy and diligence.

We place on record our compliments and gratitude to the authors and the contributors of valuable inputs and our appreciation of the officials at the

Direct Taxes Committee for their assistance in bringing out this Implementation Guide in time.

CA. Tarun Jamnadas Ghia
Chairman
Direct Taxes Committee, ICAI

CA. Sanjiv Kumar Chaudhary
Vice Chairman
Direct Taxes Committee, ICAI

Date: 22nd August, 2018

Place: New Delhi

Contents

Foreword

Preface

I.	Clause 4 – Liability to GST and Furnishing of GST Number	3
II.	Clause 19 – Amounts Admissible under Section 32AD	4
III.	Clause 24 – Amounts deemed to be Profits and Gains under section 32AD	8
IV.	Clause 26 – Sums referred to in section 43B	9
V.	Clause 29A – Amount Chargeable under section 56(2)(ix)	11
VI.	Clause 29B – Income chargeable under section 56(2)(x)	14
VII.	Clause 30A – Secondary Transfer Pricing Adjustments	20
VIII.	Clause 30B – Limitation on Interest Deduction	26
IX.	Clauses 31(ba), (bb), (bc) and (bd)	30
X.	Clauses 31(c), (d) and (e)	39
XI.	Clause 34(b)	41
XII.	Clause 36A – Dividend Chargeable under section 2(22)(e)	43
XIII.	Clause 42 – Furnishing of Form 61, 61A and 61B	49
XIV.	Clause 43	68

Implementation Guide

w.r.t. Notification No. 33/2018 dated 20.07.2018 effective from 20.08.2018

The Central Board of Direct Taxes, vide notification no. 33/2018/F No 370142/9/2018-TPL dated 20th July 2018, has notified amendments to Form No 3CD. These amendments come into force from 20th August 2018.

The amendment to Form No. 3CD has thrown yet another challenge for taxpayers and tax auditors, by mandating large reporting requirements, besides requiring sitting in judgement on certain contentious issues.

The amendments have added further reporting requirements. In addition, and more importantly, many of the new clauses require the tax auditor to act as an assessing officer and express judgements. In some clauses, auditor will have to put in extensive efforts to collect the details for reporting purposes.

The amendments in the existing Form No. 3CD put a substantial onus on the tax auditor. Moreover, the Direct Taxes Committee of ICAI will have to revise its 'Guidance Note on Tax Audit under section 44AB of the Income-tax Act, 1961' with regard to changes made in Form No. 3CD and for providing guidance to members. The "Guidance Note on Tax Audit u/s 44AB of the Income Tax Act, 1961" is amongst one of the important guidances issued by ICAI, and is referred to not only by Chartered Accountants, but also by assessing officers and various judicial forums.

This Guidance Note was last revised in the year 2014, as the formats of tax audit reports had undergone significant changes in that year, expanding the scope of verification and reporting by Chartered Accountants. Hence, considering the need to update the knowledge and enhance the professional competencies of its members, the Direct Taxes Committee of the Institute of Chartered Accountants of India had issued the Seventh edition of this Guidance Note.

In the year 2016, CBDT vide notification no. 88/2016 dated 29th September, 2016 had made changes in Form No. 3CD in Part-B, clause 13, by substituting sub-clause (d) of clause 13 by sub-clauses (d), (e) & (f), thereby incorporating the requirements with reference to the ICDS. However,

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

thereafter, some of the provisions of the ICDS have been incorporated in the Income Tax Act itself retrospectively from the year of introduction of the ICDS, effectively implying that the provisions were introduced at the same time as the ICDS.

Further, in the year 2017, CBDT vide notification no. 58/2017 dated 03rd July, 2017 made changes in Form No. 3CD in clause 31 with respect to Sections 269SS and 269T.

It is pertinent to note that as the Guidance Note on Tax Audit was last revised in the year 2014, the above changes also need to be incorporated in a new edition. The revision of the Guidance Note on Tax Audit requires substantial time and efforts. The amendments by notification no. 33 dated 20th July, 2018 have been made applicable with effect from 20th August, 2018, other than two clauses 30C and 44, whose applicability has been kept in abeyance till 31st March 2019 vide Circular No 6 of 2018 dated 17th August 2018. The Direct Taxes Committee of ICAI has decided to take the initiative of coming out with an implementation guide with respect to the amendments made in Form No. 3CD, so as to assist the taxpayers in filing of their returns in a hassle-free and timely manner.

There are various additional reporting requirements, which come into effect on account of the 2018 amendments. Given that the amendments to Form No. 3CD (other than clauses 30C and 44) are effective from 20th August 2018, these amendments would not apply to tax audits which have already been signed and uploaded before the amendments come into effect. In such cases, the revised particulars need not be given.

In this Implementation Guide, only the amendments made by the notification no. 33/2018 dated 20th July, 2018 which are effective from 20th August 2018 have been dealt with. In respect of each amendment, first the amendment is reproduced, then if it is an amendment to an existing clause, the revised clause has been reproduced. The discussion is, however, confined to only the amendment. Therefore, it is advisable that the existing Guidance Note on Tax Audit under section 44AB of the Income-tax Act, 1961 (revised 2014 edition) is referred to in respect of the clause as hitherto, if any, and then the amendment as discussed in this Guide is referred to.

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

It may also be kept in mind that under section 44AB, the audit is required to be of the books and accounts maintained in respect of the business or profession carried on by the assessee. Therefore, so far as the reporting requirements under clauses relating to heads of income other than “Profits and Gains of Business or Profession” are concerned, these can only be in relation to entries made in such books of account, and does not extend to transactions not recorded in such books of account.

It also needs to be kept in mind that the particulars in Form No. 3CD are the responsibility of the assessee, as clarified in paragraph 11.10 of the Guidance Note on Tax Audit under section 44AB of the Income-tax Act, 1961 (revised 2014 edition), and that the tax auditor is merely verifying the correctness of the particulars.

As in the case of all other audits, a tax audit under section 44AB is also subject to peer review. It is therefore extremely important that the tax auditor retains working papers and other documents, which demonstrate the work done by him and support the stand taken by him while reporting.

Attention is also invited to para 16.2 and 16.3 of the existing Guidance Note on Tax Audit under section 44AB of the Income-tax Act, 1961 (revised 2014 edition) in respect of reporting of particulars in Form No. 3CD by the assessee.

The amendments carried out in Form No. 3CD are as under:

I. Clause 4 – Liability to GST and Furnishing of GST Number:

Amendment to clause no. 4:

In serial number 4, -

- (a) after the words “sales tax,”, the words “goods and services tax,” shall be inserted;
- (b) after the words “registration number or”, the words “GST number or” shall be inserted;

After amendment, the revised clause appears as follows:

4. Whether the assessee is liable to pay indirect tax like excise duty, service tax, sales tax, goods and service tax, customs duty, etc. if yes, please furnish the registration number or GST number or any other identification number allotted for the same.

Clause 4 of Form No. 3CD hitherto required furnishing of information as to whether the assessee is liable to pay indirect tax like excise duty, service tax, sales tax, customs duty, etc. After sales tax, goods and service tax ("GST") has also been added to the list of such taxes. Therefore, the question of whether the assessee is liable to pay goods and service tax needs to be answered, along with liability to pay other indirect taxes. Even if the liability to pay is only under the reverse charge mechanism, the fact of being liable needs to be answered in the affirmative, with the clarification that such liability is only under the reverse charge mechanism.

In case the assessee is liable to GST, the GST registration number, i.e. the GSTIN needs to be furnished. Where an assessee has multiple GSTIN numbers, being registered under different states as well as under Central GST, all the GSTIN numbers allotted to the assessee need to be mentioned.

This amendment is merely a clarificatory amendment, as the earlier clause in any case referred to all indirect taxes, by using the term "etc."

II. Clause 19 – Amounts Admissible under Section 32AD

Amendment to clause no. 19:

In serial number 19, in the table, after the row with entry "32AC", the row with entry "32AD" shall be inserted;

After amendment, the revised clause appears as follows:

19. Amounts admissible under sections:

Section	Amount debited to profit and loss account	Amounts admissible as per the provisions of the Income-tax Act, 1961 and also fulfils the conditions. If any specified under the relevant provisions of Income-tax Act, 1961 or Income-tax Rules, 1962 or any other guidelines, circular, etc., issued in this behalf.
32AC		
32AD		
33AB		
33ABA		
35(1)(i)		
35(1)(ii)		
35(1)(iia)		
35(1)(iii)		
35(1)(iv)		
35(2AA)		
35(2AB)		
35ABB		
35AC		
35AD		
35CCA		
35CCB		
35CCC		
35CCD		
35D		
35DD		
35DDA		
35E		

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

Clause 19 of Form No. 3CD requires quantifications of the amount debited to profit and loss account and the amounts admissible under various sections, which also fulfil the conditions required by the relevant provision, the rules, or any other guideline or circular issued in that behalf. Hitherto, this clause referred to sections 32AC, 33AB, 33ABA, 35(1)(i), 35(1)(ii), 35(1)(iia), 35(1)(iii), 35(1)(iv), 35(2AA), 35(2AB), 35ABB, 35AC, 35AD, 35CCA, 35CCB, 35CCC, 35CCD, 35D, 35DD, 35DDA and 35E. This clause has now been amended to include section 32AD.

Section 32AD, inserted by the Finance Act 2015 with effect from assessment year 2016-17, entitles an assessee to claim an allowance of 15% in the year of installation of the actual cost of new plant and machinery installed by the assessee for manufacture or production of any article or thing, on or after 1st April 2015 but before 1st April 2020, in any notified backward area in the States of Andhra Pradesh, Bihar, West Bengal and Telangana. This is a one-time benefit available in the year of installation of the new asset by the eligible undertaking and is available over and above the claim of depreciation, as well as the additional depreciation of 35% available under section 32(1)(iia) for the same backward areas.

Plant and machinery, for this purpose, does not include the following types of assets:

1. Ship or aircraft;
2. Plant or machinery used within or outside India by any other person before it's installation by the assessee;
3. Plant or machinery installed in any office premises, or any residential accommodation, including a guest house;
4. Office appliances, including computers or computer software;
5. Any vehicle;
6. Plant or machinery, the whole of the actual cost of which is allowed as deduction (whether by way of depreciation or otherwise) in computing income chargeable under the head

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

“Profits and Gains of Business or Profession” of any previous year.

The provisions of section 32AD are summarised in the following table:

Available to	All assesses
Condition of setting up new undertaking of enterprise	Assessee should set up an undertaking or enterprise for manufacture or production of any article or thing on or after 1-4-2015.
Location	Undertaking or enterprise should be set up in any notified backward area in the State of Andhra Pradesh, Bihar, Telangana or West Bengal. (Refer Notification No. SO 2478(E)[No. 61/2016 (F.NO.142/13/2015- TPL)] dated 20-7-2016 for list of such specified areas)
Assessment years in which deduction is available	Assessment Year 2016-17 to Assessment Year 2020-21.
Actual cost of assets for which deduction is available	Actual cost of new asset may be of any amount. (However any Input Tax credit in respect of GST, VAT or Cenvat if claimed needs to be excluded from such cost)
Condition for deduction	Deduction is available in the year in which the new asset is installed. If asset is acquired in an earlier year and installed in a subsequent year, then deduction would be available in the subsequent year. The new asset should be acquired and installed during the period 1 st April 2015 to 31 st March 2020. Both acquisition and installation have to be within this period, though they may be in different years within the period.

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

For the list of backward districts notified as eligible under section 32AD, reference may be made to CBDT Notification No. 71/2015/F No. 142/13/2015-TPL dated 17th August 2015, and 61/2016/F No. 142/13/2015-TPL dated 20th July 2016 for the States of Bihar, Telangana and West Bengal, and Notification No. 85/2016/F.No.142/13/2015-TPL dated 28th September 2016 for the state of Andhra Pradesh.

The tax auditor should verify the list of plant and machinery installed during the previous year in such backward areas for the manufacture of an article or thing. He should thereafter confirm that such plant and machinery does not fall within the exclusions to the definition of “new asset” contained in section 32AD(4). He can then compute the amount of eligible deduction under section 32AD. There will be no disclosure required of amount debited to profit & loss account, which should be treated as nil, since the deduction is linked to cost of plant and machinery, which would be treated as an asset in the balance sheet, and not to any expenditure.

III. Clause 24 – Amounts deemed to be Profits and Gains under section 32AD

Amendment to clause no. 24:

In serial number 24, after the words “32AC or”, the words “32AD or” shall be inserted.

After amendment, the revised clause appears as follows:

24. Amounts deemed to be profits and gains under section 32AC or 32AD or 33AB or 33ABA or 33AC.

Clause 24 so far required disclosure of amounts deemed to be profits and gains under section 32AC, or 33AB, or 33ABA or 33AC. This clause has been amended to also require reporting of amounts deemed to be profits and gains under section 32AD.

Under section 32AD(2), if any new asset, in respect of which deduction under section 32AD had been allowed, is sold or otherwise transferred

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

(except in cases of amalgamation, demerger or reorganisation of business referred to in clauses (xiii), (xiiib) or (xiv) of section 47) within a period of five years from the date of its installation, the amount of deduction allowed earlier under section 32AD in respect of such asset is deemed to be the profits and gains of business of the previous year in which the asset is sold or otherwise transferred.

The tax auditor should verify whether any assets in the backward districts have been sold, and if so, whether deduction under section 32AD has been allowed in respect of such assets. If any deduction has been allowed, the amount of such deduction should be quantified. Capital gains arising on transfer of the asset are not required to be reported. The reporting should be done giving description of the asset sold, the date of installation, the original cost and the quantum of deduction allowed which is now taxable as profits and gains of business or profession.

IV. Clause 26 – Sums referred to in section 43B

Amendment to clause no. 26:

In serial number 26, for the words “or (f)”, the words “, (f) or (g)” shall be substituted.

After amendment, the revised clause appears as follows:

26. In respect of any sum referred to in clause (a), (b), (c), (d), (e), (f) or (g) of section 43B, the liability for which:-

- (A) pre-existed on the first day of the previous year but was not allowed in the assessment of any preceding previous year and was**
 - (a) paid during the previous year;**
 - (b) not paid during the previous year;**
- (B) was incurred in the previous year and was**
 - (a) paid on or before the due date for furnishing the return of income of the previous year under section 139(1);**

(b) not paid on or before the aforesaid date.

(State whether sales tax, customs duty, excise duty or any other indirect tax, levy, cess, impost etc. is passed through the profit and loss account.)

Clause 2 requires disclosure of sums incurred and paid, which are referred to in clauses (a), (b), (c), (d), (e) and (f) of section 43B(1). The amended clause now also requires reporting of sums covered by clause (g) of section 43B(1).

Clause (g) was inserted by the Finance Act 2016 and applies from assessment year 2017-18. It refers to any sum payable by the assessee to the Indian Railways for the use of railway assets.

Payments for the use of railway assets would not include basic rail freight, as such freight is for the service of transport and not for use of railway assets. The distinction between contracts of transportation and contracts for user (hire) of assets has been brought out, in the context of tax deduction at source, by the High Courts and the Tribunal in the following cases:

CIT (TDS) v Swayam Shipping Services (P.) Ltd. [2011] 339 ITR 647 (Guj)

CIT v Reliance Engineering Associates (P) Ltd [2012] 209 Taxman 351 (Guj)

ACIT(TDS) v Lotus Valley Education Society [2014] 223 Taxman 82 (All)(MAG)

CIT v Apeejay School, Apeejay School Campus [2014] 226 Taxman 307 (All)

CIT v Bharat Electronics Ltd [2015] 230 Taxman 651 (All)

CIT(TDS) v Indian Oil Corporation Ltd. [2018] 92 taxmann.com 281 (Uttarakhand)

ITO(TDS) v Indian Oil Corpn. (Marketing Division) [2012] 13 ITR(T) 79 (Del ITAT)

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

Sums payable for use of railway assets would however include amounts payable for hire of railway wagons, or for hire of rail sidings, or lease rent payable for use of railways land or buildings.

In case of payments for use of hoardings/display panels put up on railway premises, whether the payment is for use of railway assets would depend upon the terms of the contract. In case the payment is being made by an advertising agency to the railways for putting up hoardings/display panels on railway premises, such payment would amount to payment for use of railway assets, as the payment is for the use of space on the premises. However, where an advertiser is making payment to the railways for display of advertisements on hoardings/displays in railway premises, such a payment is in the nature of payment for the services of advertisement, and not for the use of railway assets.

The tax auditor needs to obtain a list of amounts payable to the railways for the previous year from the assessee, and verify the correctness of such amounts. He thereafter needs to analyse such amounts, bifurcating them between payments for the use of railway assets and other payments. He thereafter needs to verify the applicability of section 43B to such amounts, by checking the dates of payment of such amounts.

V. Clause 29A – Amount Chargeable under section 56(2)(ix)

After serial number 29 and the entries relating thereto, the following shall be inserted, namely:-

29A. (a) *Whether any amount is to be included as income chargeable under the head 'income from other sources' as referred to in clause (ix) of sub-section (2) of section 56? (Yes/No)*

(b) *If yes, please furnish the following details:*

(i) *Nature of income:*

(ii) *Amount thereof:*

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

A new clause 29A has been inserted, requiring disclosure of whether any amount is chargeable to tax under section 56(2)(ix), and if so, to furnish prescribed details of such income.

Section 56(2)(ix) was inserted by the Finance (No 2) Act 2014, with effect from assessment year 2015-16. It provides for taxability as Income from Other Sources of any sum of money received as an advance or otherwise in the course of negotiations for transfer of a capital asset, if such sum is forfeited and the negotiations do not result in transfer of such capital asset. Prior to such amendment, section 51 provided for deduction of such amount forfeited from the cost or written down value of the asset. Section 51 has now been amended to provide that any amount taxed under section 56(2)(ix) shall not be deducted from the cost or written down value.

The auditor is not required to report any such forfeited amount if it is in respect of a personal capital asset, where neither the asset, the advance nor the forfeiture is recorded in the books of account relating to the business or profession.

The requirement of reporting arises only on forfeiture of such amount. If an advance has been received and has been outstanding for a considerable period of time, there is no requirement to report such amount unless and until it is forfeited by an act of the assessee.

Only forfeiture of amounts received as advance towards transfer of a capital asset is required to be reported under this clause. Any advances received and forfeited towards sale of stock-in-trade would be taxable under section 28(i), and would not be required to be reported since the amount would be credited to profit & loss account.

A forfeiture has to be either in terms of the right to forfeit such advance under the contractual terms of the agreement, or as agreed upon with the prospective purchaser. It has to have the sanction of law, or the contract. It has to be a positive action on the part of the assessee. However, once the assessee has forfeited the amount, then the matter will become the subject of reporting under this clause. A mere notice of forfeiture by the assessee, which is contested by the other party,

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

may not amount to a forfeiture. In such a case, if the amount is not written back by the assessee, reporting of such amount is not required merely on the grounds of issue of notice of forfeiture. In case such amount is written back by the assessee, such amount should be reported under this clause, giving the stand of the assessee.

Therefore, in respect of advances received and assets not transferred, the tax auditor should refer to terms of contract and if the contract contains a right to forfeit on some conditions and such conditions have occurred, then the tax auditor should verify with the auditee as to whether the amount has been forfeited. If the assessee contends that the amount has not been forfeited, the tax auditor may look at totality of developments and may obtain a management representation that even though the contract permits forfeiture on some conditions and even though such conditions have occurred but the assessee has not yet forfeited the advance and other sums received. Further, even if the assessee has forfeited the amount without right to forfeit, if there is no action by the other party, the amount so forfeited may become income under sub clause (ix) and the tax auditor should report such forfeiture with appropriate note.

Mere unilateral writing back of an advance by credit to the profit and loss account, asset account or capital account may not by itself amount to an act of forfeiture by the assessee. Such a write back is however an indication of a possible act of forfeiture, which needs further verification by the tax auditor. It is advisable for the tax auditor to disclose all such acts of unilateral write backs as well, out of abundant precaution, with appropriate note regarding the stand taken by the assessee.

The Supreme Court, in the case of Bankura Municipality v. Lalji Raja and Sons AIR 1953 SC 248, 250 has observed:

"According to the dictionary meaning of the word 'forfeiture', the loss or the deprivation of goods has got to be in consequence of a crime, offence or breach of engagement or has to be by way of penalty of the transgression or a punishment for an offence.

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

Unless the loss or deprivation of the goods is by way of a penalty or punishment for a crime, offence or breach of engagement, it would not come within the definition of forfeiture."

The tax auditor should therefore obtain a certificate from the assessee regarding all such advances received towards transfer of capital assets which have forfeited during the year. The advance might have been received during the previous year or earlier. For the purpose of this clause, the previous year in which forfeiture takes place is relevant. He should also examine whether any amount of such advances has been written back during the year, and examine the basis of such write back to determine whether such write back was on account of an act of forfeiture. A write back without an act of forfeiture is generally unlikely, and therefore, if the assessee contends that he has written the advance back but that it is not a case of forfeiture, then the tax auditor will have to exercise professional judgement and should report accordingly.

The reporting requirement is to state whether any amount is to be included as income chargeable under the head "Income from Other Sources". If the answer to this is yes, then details are required to be furnished as under:

- (i) Nature of Income
- (ii) Amount thereof

As regards nature of income, the tax auditor should specify that the amount is forfeiture of advance received towards sale of the particular capital asset.

VI. Clause 29B – Income chargeable under section 56(2)(x)

29B. (a) Whether any amount is to be included as income chargeable under the head 'income from other sources' as referred to in clause (x) of sub-section (2) of section 56? (Yes/No)

(b) If yes, please furnish the following details:

(i) Nature of income:

(ii) Amount (in Rs.) thereof:

A new clause 29B has also been introduced, requiring reporting of amount includible as income chargeable under the head "Income from Other Sources" under section 56(2)(x).

Section 56(2) of the Income Tax Act, 1961 inter alia deals with receipts without consideration or for inadequate consideration.

The gifts were taxable earlier till 1st October, 1998 under the Gift Tax Act, 1958. The provisions regarding receipts without consideration have been introduced w.e.f. 1st September, 2004. Since most of such receipts tantamount to gifts, the provisions are popularly known, as relating to gifts and deemed gifts, although the coverage is wider to include all other specified receipts without consideration or for inadequate consideration.

The provisions initially covered only sum of money received without consideration. Thereafter, the provisions have been expanded from time to time. Till 30th September, 2009, only sum of money exceeding prescribed limit received without consideration was taxable if the recipient was either an individual or an HUF. W.e.f. 1st October, 2009, the provisions include cases of immovable properties in the nature of land or building or both received without consideration to be taxed on the basis of stamp valuation. Thereafter, the cases of such immovable properties purchased at less than fair market value are also included in the net of 56(2). The expanded provisions also include receipt of properties, other than immovable properties, either without consideration or for inadequate consideration as compared to its fair market value. The basis of valuation in respect of such immovable properties has been stamp duty valuation and for the other specified properties, the FMV. Till 1st June, 2010, the provisions regarding receipts without consideration applied only to two types of assessee viz. individual and an HUF. W.e.f. 1st June, 2010, the provisions are applicable to firms and closely held companies in respect of shares of

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

closely held companies without consideration or for inadequate consideration. Valuation rules were introduced in Rule 11U and 11UA. Thereafter, w.e.f. 1st April, 2013, share premium received by closely held companies in excess of fair market value of issued shares was also covered. However, w.e.f. 1st April, 2017, the scope of section 56(2) in respect of receipts without consideration or for inadequate consideration has been further expanded to include every person.

Section 56(2)(x) was introduced by the Finance Act 2017, with effect from assessment year 2017-18. However, since it applies to amounts or assets received on or after 1st April 2017, it effectively applies with effect from assessment year 2018-19.

Under this section, the following amounts/value of assets received by an assessee from any person or persons are chargeable to tax as Income from Other Sources:

- (i) Any sum of money, received without consideration, if it exceeds Rs. 50,000
- (ii) A. Stamp duty value of any immovable property received without consideration, stamp duty value of which exceeds Rs. 50,000
B. Stamp duty value in excess of the consideration of any immovable property received, where the stamp value exceeds the consideration by more than Rs. 50,000.
- (iii) A. Aggregate Fair market value of property, other than immovable property, without consideration, where the aggregate fair market value of such property exceeds Rs. 50,000
B. Aggregate Fair market value of property, other than immovable property, in excess of the consideration, where the aggregate fair market value exceeds the consideration by more than Rs. 50,000.

With effect from assessment year 2019-20, in case of an immovable property, where the stamp duty value exceeds the consideration by

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

less than the higher of (i) Rs. 50,000 or (ii) 5% of the consideration, the difference is not chargeable to tax. Therefore, for any immovable property, where the stamp duty value is up to 105% of the sale consideration, no addition can be made under section 56(2)(x). Till assessment 2018-19, the permissible difference was only Rs. 50,000 per property, and was not linked to the percentage of the consideration.

The term “property” has been defined to include only specific types of assets. It has been defined to mean the following capital asset of the assessee, namely:—

- (i) immovable property being land or building or both;
- (ii) shares and securities;
- (iii) jewellery;
- (iv) archaeological collections;
- (v) drawings;
- (vi) paintings;
- (vii) sculptures;
- (viii) any work of art; or
- (ix) bullion

Receipt of assets, other than these, would not be covered by the provisions of this section, and would therefore not be required to be reported. Stock-in-trade, not being a capital asset, is also not covered by this provision.

There is also an exemption for certain receipts from the provisions of this section. These are for any sum of money or any property received—

- (I) from any relative; or
- (II) on the occasion of the marriage of the individual; or
- (III) under a will or by way of inheritance; or

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

- (IV) in contemplation of death of the payer or donor, as the case may be; or
- (V) from any local authority as defined in the Explanation to clause (20) of section 10; or
- (VI) from any fund or foundation or university or other educational institution or hospital or other medical institution or any trust or institution referred to in clause (23C) of section 10; or
- (VII) from or by any trust or institution registered under section 12A or section 12AA; or
- (VIII) by any fund or trust or institution or any university or other educational institution or any hospital or other medical institution referred to in sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) of clause (23C) of section 10; or
- (IX) by way of transaction not regarded as transfer under clause (i) or clause (iv) or clause (v) or clause (vi) or clause (via) or clause (viaa) or clause (vib) or clause (vic) or clause (vica) or clause (vicb) or clause (vid) or clause (vii) of section 47; or
- (X) from an individual by a trust created or established solely for the benefit of relative of the individual.

Such receipts which are exempt, are not chargeable as income under section 56(2)(x), and are therefore not required to be reported under this clause.

The tax auditor should obtain a certificate from the assessee regarding any such receipts during the year, either received in his business or profession or recorded in the books of account of such business or profession. He should also scrutinise the books of account to verify whether receipt of any such amount or asset has been recorded therein.

In case there are any such receipts, in case of immovable property, the value adopted for stamp duty purposes on the date of transfer is to be taken for computing income under this section. However, where an

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

agreement fixing the consideration has been entered into before the date of registration, and at least a part of the consideration has been paid by account payee cheque or account payee bank draft or by use of electronic clearing system through a bank account, on or before the date of such agreement for transfer, the stamp duty value on the date of such agreement may be adopted. In such cases, the assessee has a choice as to whether to adopt the stamp duty value on the date of agreement for transfer, or on the date of the transfer. The stamp duty value on the date of transfer would be indicated in Index II annexed to the registered conveyance or sale deed or instrument of transfer executed by the parties.

In a case where the assessee has disputed the stamp duty value before the stamp authorities, and such dispute is pending as on the date of finalisation of the audit, the tax auditor should state such fact, stating both the stamp duty value adopted by the stamp authorities as well as the stamp duty value claimed by the assessee to be the correct value in such dispute.

In case of other assets, the provisions of rule 11UA(1) read with rule 11U are to be followed for determination of the fair market value, to compute the income under this section.

Wherever there is a dispute or doubt as to the valuation of an asset, it would be advisable for the tax auditor to request the assessee to obtain a valuation report from a registered valuer. The report of the tax auditor may then be based on such valuation report.

The tax auditor is required to report the nature of income and the amount of income chargeable under this clause. In the nature of income, the details of the asset received and the date of receipt should be given. While stating the amount of income, a computation of how such income has been arrived at should be provided, giving the fair market value or stamp duty value of the asset and the amount of consideration.

VII. Clause 30A – Secondary Transfer Pricing Adjustments

After serial number 30 and the entries relating thereto, the following shall be inserted, namely:-

30A. (a) *Whether primary adjustment to transfer price, as referred to in sub-section (1) of section 92CE, has been made during the previous year? (Yes/No)*

(b) *If yes, please furnish the following details:-*

(i) *Under which clause of sub-section (1) of section 92CE primary adjustment is made?*

(ii) *Amount (in Rs.) of primary adjustment:*

(iii) *Whether the excess money available with the associated enterprise is required to be repatriated to India as per the provisions of sub-section (2) of section 92CE? (Yes/No)*

(iv) *If yes, whether the excess money has been repatriated within the prescribed time (Yes/No)*

(v) *If no, the amount (in Rs.) of imputed interest income on such excess money which has not been repatriated within the prescribed time:*

A new clause 30A has been introduced, requiring reporting of primary adjustments and various other details, for the purpose of making secondary adjustments under section 92CE.

Section 92CE, providing for secondary transfer pricing adjustments, has been introduced by the Finance Act 2017, with effect from assessment year 2018-19.

The section requires making of a secondary adjustment in certain cases where primary transfer pricing adjustments have been made. These cases are where transfer pricing adjustment has been:

- i. made by the taxpayer of his own accord in his return of income;
- ii. made by the assessing officer and accepted by the taxpayer;

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

- iii. determined under an Advance Pricing Agreement entered into by the assessee under section 92CC;
- iv. made as per Safe Harbour Rules framed under section 92CB; or
- v. arising as a result of a resolution of an assessment under Mutual Agreement Procedure under a double taxation avoidance agreement (DTAA) entered into under section 90 or 90A.

No secondary adjustment is required if the primary adjustment relates to assessment year 2016-17, or an earlier assessment year. No secondary adjustment is required if the amount of primary adjustment made in any previous year does not exceed Rs. 1 crore.

Due to the primary adjustment, if there is an increase in the total income or a reduction in the loss of the assessee, the adjustment (difference between the arm's length price and the actual transaction price) is regarded as excess money available with the associated enterprise, and is to be repatriated to India within the prescribed time. Where the excess money is not repatriated to India within the prescribed time, it is deemed as an advance to the associated enterprise and interest is to be computed on such advance in the prescribed manner, as a secondary adjustment.

Rule 10CB provides for a time limit of 90 days for repatriation of the excess money. This period of 90 days is to be computed from the following dates, in respect of each type of primary adjustment:

- (i) Where primary adjustments are made in the return of income, from the due date of filing of the return of income under section 139(1);
- (ii) Where primary adjustments made by the Assessing Officer have been accepted by the assessee, from the date of order of the Assessing Officer or the appellate authority, as the case may be;

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

- (iii) Where an Advance Pricing Agreement has been entered into by the assessee, from the due date of filing of the return of income under section 139(1);
- (iv) Where the adjustment is as per Safe Harbour Rules, from the due date of filing of the return of income under section 139(1);
- (v) Where the adjustment is on account of an agreement made under the Mutual Agreement Procedure under a DTAA, from the due date of filing of the return of income under section 139(1).

It may be noted that CBDT has proposed draft rules on 19th June 2018 for modification of existing rule 10CB in case of Advance Pricing Agreement (APA) and Mutual Agreement Procedure (MAP). As per draft rules, commencement of 90 days' time limit for the purpose of secondary adjustment would be as follows:

- In case of APA, from the date on which APA has been entered into by the assessee
- In case of MAP, from the date of giving effect by the Assessing Officer to the resolution reached under the MAP

Public comments have been invited on the draft rules by CBDT. Rule 10CB may be modified to this extent. It is also possible that additional guidance may be provided on the applicability of rules, which may also have a bearing on the reporting in the tax audit report.

Rule 10CB further provides for the rate of interest on excess money which is not repatriated within the time limit. Where the international transaction is denominated in Indian rupees, the rate of interest will be the one-year marginal cost of fund lending rate of State Bank of India as on 1st April of the relevant previous year, plus 325 basis points (plus 3.25%). Where the international transaction is denominated in foreign currency, the rate of interest shall be the six-month London Interbank Offered Rate (LIBOR) as on 30th September of the relevant previous year plus 300 basis points (plus 3%).

Secondary adjustments are applicable only in respect of transfer pricing adjustments relating to international transactions, and not in respect of domestic transfer pricing adjustments.

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

Clause 30A requires reporting of whether primary adjustment to transfer price, as referred to in section 92CE(1), has been made during the previous year. Thus the tax auditor is required to verify whether any primary adjustment is 'made' in terms of S. 92CE(1) during the previous year under consideration. The primary adjustment made may not necessarily relate to previous year under consideration. To illustrate, consider a case where taxpayer makes a voluntary adjustment in his return of income filed in November 2019 (pertaining to FY 2018-19). Such primary adjustment is to be reported in the tax audit report of FY 2019-20 filed on or before November 2020, for the reason that the primary adjustment has taken place in November 2019 (i.e. during FY 2019-20). In the above example, if the excess money with the AE is not repatriated to India within 90 days from the due-date of filing of ROI i.e. by 28th February 2020, interest on such excess money computed as per the prescribed rules will need to be reported in the tax audit report filed in November 2020.

It is also necessary that the disclosure under Clause 30A may need to be done in respect of each and every type of primary adjustment made in the relevant financial year, irrespective of the previous year to which this adjustment pertains to. For instance, an assessment order in relation to say, FY 2017-18 may be passed in during FY 2018-19 wherein AO has made a primary adjustment and the same has been accepted by the taxpayer. Similarly, an APA may be signed by the taxpayer in the FY 2018-19, which may provide for primary adjustment for the four roll back years from FY 2013-14 to FY 2016-17 as well as for FY 2017-18. All these primary adjustments may need to be reported in the tax audit report of FY 2018-19.

For this purpose, the tax auditor should obtain a certificate from the assessee, as to what transfer pricing adjustments have been made in the return/(s) of income filed during the previous year, whether any advance pricing agreement was entered into during the previous year, whether any transfer pricing adjustment was made/confirmed in an assessment order/appellate authority order passed during the previous year, or whether any agreement has been arrived at under a Mutual

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

Agreement Procedure during the previous year. The tax auditor should also verify tax records to check whether there is any such occurrence.

If there is any such occurrence relating to assessment years 2017-18 or later years, and the amount of primary adjustment exceeds Rs. 1 crore, the tax auditor is required to report the fact that there has been a primary adjustment made during the previous year. Primary adjustments for earlier years prior to assessment year 2017-18, or primary adjustments totalling less than Rs. 1 crore for a previous year, which do not warrant a secondary adjustment, should also be reported under clause 30A(a)(i).

The tax auditor then needs to report the relevant clause of section 92CE(1) under which the relevant adjustment falls, and the amount of adjustment. In this regard, the auditor should also obtain a prior management representation on the information obtained to be true and accurate, basis which he should make the disclosure in the tax audit report. Hence the primary onus should be with the management.

Under clause 30A(b)(iii), the requirement is to report whether the excess money available with the associated enterprise is required to be repatriated to India as per the provisions of section 92CE(2). If the adjustment relates to an assessment year prior to assessment year 2017-18, or the primary adjustment is of less than Rs. 1 crore, the excess money is not required to be repatriated to India, and the answer to this question may be given as "No". The answer to this question should be given as "Yes" only if the adjustment relates to assessment year 2017-18 or later assessment years, and if the adjustment exceeds Rs. 1 crore.

In case any such primary adjustment has taken place, which requires repatriation of the excess money, the tax auditor should verify whether the excess money has been received, and whether it has been received within the prescribed time. He should report accordingly.

In case the excess money has not been repatriated within the prescribed time, the imputed interest income, which would be the secondary adjustment, needs to be computed. For this purpose, the

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

tax auditor should ask the taxpayer to obtain certificates of the relevant SBI/LIBOR interest rates, and provide the computation of the imputed interest income. The tax auditor should verify the correctness of such calculation of interest, on the basis of the certificates regarding the SBI/LIBOR rates plus the incremental interest, as per rule 10CB.

There is some ambiguity with respect to the date up to which the imputed interest income is to be reported – whether interest income imputed till the end of the previous year is to be reported or whether interest income imputed up to the date of furnishing of Tax Audit Report is to be reported. Since the reporting is for the previous year, it is advisable for the tax auditor to ensure that the amount of interest imputed till the end of the previous year is furnished. In case the interest up to the date of filing of the tax audit report is given, it is advisable for the tax auditor to provide a break-up of the amount of interest imputed till end of the relevant previous year and for the period post the end of the relevant previous year ending with the date of filing tax audit report.

It is possible that interest income may be imputed during the relevant previous year in connection with primary adjustment made during the earlier previous years.

It is possible that amount of imputed interest income on the excess money not repatriated to India may relate to more than one year. Having regard to Rule 10CB, the interest liability extends till the date of repatriation. Accordingly, for the relevant year under audit, such liability in respect of imputed interest may extend not only to the primary adjustment referred to in clause 30A(a) above but may also relate to primary adjustment made in the earlier years.

Prima-facie, it appears that reporting of such interest is not required to be reported under clause 30A(b)(v) since Clause 30A requires reporting only in relation to primary adjustment made during the relevant previous year. However, on the other hand, such interest income arising from primary adjustment made in earlier year is also taxable during the previous year under consideration and will be

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

included in the return of income of the concerned previous year. Thus, it may be advisable for the taxpayer to furnish and tax auditor to verify and report the information pertaining to such primary adjustments in respect of interest income which is chargeable u/s. 92CE(2).

This is important as the return filing utility may synchronise the parameters of imputed interest u/s. 92CE(2) as offered in the return of income with the parameters stated in the tax audit report under this clause. Such reporting would align the information in tax audit report with the return of income.

VIII. Clause 30B – Limitation on Interest Deduction

30B. (a) Whether the assessee has incurred expenditure during the previous year by way of interest or of similar nature exceeding one crore rupees as referred to in sub-section (1) of section 94B? (Yes/No)

(b) If yes, please furnish the following details:-

(i) Amount (in Rs.) of expenditure by way of interest or of similar nature incurred:

(ii) Earnings before interest, tax, depreciation and amortization (EBITDA) during the previous year (in Rs.):

(iii) Amount (in Rs.) of expenditure by way of interest or of similar nature as per (i) above which exceeds 30% of EBITDA as per (ii) above:

(iv) Details of interest expenditure brought forward as per sub-section (4) of section 94B:

A.Y.	Amount (in Rs.)

(v) Details of interest expenditure carried forward as per sub-section (4) of section 94B:

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

A.Y.	Amount (in Rs.)

The newly inserted clause 30B requires reporting for the purposes of examining allowability of expenditure by way of interest in respect of debt issued by a non-resident associated enterprise (“AE”) under section 94B, while computing income under the head “Profits and Gains of Business or Profession”.

Section 94B was inserted by the Finance Act 2017, with effect from assessment year 2018-19. It provides that, where an Indian company or a permanent establishment of a foreign company in India, incurs any expenditure by way of interest or of similar nature exceeding Rs. 1 crore which is deductible in computation of income under the head “Profits & Gains of Business or Profession” in respect of a debt issued by a non-resident AE, such interest, to the extent of excess interest, shall not be deductible. Further, if the debt is issued by a lender who is not associated, but an AE provides either an implicit or explicit guarantee to such lender, or deposits a corresponding and matching amount of funds with the lender, such debt is also regarded as having been issued by an AE.

The excess interest is to be computed as the lower of:

- (i) Total interest paid or payable in excess of 30% of earnings before interest, taxes, depreciation and amortisation (“EBITDA”) of the borrower in the previous year; or
- (ii) Interest paid or payable to AEs for that previous year.

The excess interest, which is disallowed, is allowed to be carried forward for a period of 8 assessment years following the year of disallowance, to be allowed as a deduction against profits and gains of any business in the subsequent years, to the extent of maximum allowable interest expenditure under this section.

The term “debt” is widely defined to mean any loan, financial instrument, finance lease, financial derivative, or any arrangement that gives rise to interest, discounts or other finance charges that are

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

deductible in computation of income chargeable under the head “Profits and Gains of Business or Profession”.

Section 94B(3) excludes an Indian company or a PE of a foreign company engaged in the business of banking or insurance from applicability of the section.

Also, if the assessee is not a company or the PE of a foreign company, the provisions of section 94B do not apply, and details under this clause are not required to be provided. In such cases, the answer to question (a) may be given as “No”.

Similarly, the section would apply only where interest (or expenditure of similar nature) paid or payable to non-resident AE(s) (or in respect of a debt where an AE – resident or non-resident – has provided an implicit or explicit guarantee or matching deposit) exceeds Rs. 1 crore during the year. In case the interest and similar expenditure paid or payable to non-resident AE(s) (or non-resident lender of such debt) does not exceed Rs. 1 crore, the section is not applicable. Hence, the answer to question (a) should be given as “No”.

Expenditure of similar nature should be read in the context of “debt” as defined in section 94B(5)(ii). “Debt” is defined to mean loan, financial instrument, finance lease, financial derivative, or any arrangement that gives rise to interest, discount or finance charges. “Expenditure of similar nature” for the purposes of this section would therefore include discount or premium on securities, finance cost component of lease rentals in respect of finance leases, or other finance charges.

In computing the limit of Rs. 1 crore, only interest and expenditure of similar nature which is deductible while computing income under the head “Profits and Gains of Business or Profession” should be considered, and not interest deductible under any other head of income or interest which is otherwise not deductible. Therefore, any interest disallowable under section 14A, under the proviso to section 36(1)(iii), under section 40A(i) or section 40A(2) should not be considered as interest for the purposes of section 92B(1). Similarly, interest disallowed on account of transfer pricing under section 92, should also not be considered, since such interest is not allowable in

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

computing income under the head “Profits and Gains of Business or Profession”.

In such consideration, there are two views as to whether it is the aggregate of all interest paid or payable to all non-resident AEs which is to be considered for the limit of Rs. 1 crore, or whether interest paid or payable to each non-resident AE is to be examined vis-a-vis the limit of Rs. 1 crore. Based on the view taken by the assessee, appropriate disclosure should be made in Form No. 3CD.

In case such interest exceeds Rs. 1 crore, details in part (b) of the clause need to be given. In item (i) of sub-clause (b), details of expenditure by way of interest or of similar nature need needs to be provided. The language in the clause creates a doubt whether details that need to be given are of the total amount of interest and similar expenditure claimed as a deduction and not just the interest paid to non-resident AE(s). However, in view of the requirement of clause (a) where a specific question has been asked only with respect to 94B(1) the subsequent clauses seem to be consequential and flowing from clause (a). Section 94B(1) confines itself to interest paid to NR AE and section 94B(2) can be regarded as controlled by section 94B(1) since S.94B(2) operates “for the purposes of sub-section (1)”. The computation of “excess interest” as per section 94B(2) should be within the boundaries of interest referred to in s.94B(1), which is NR AE interest. The language of para 46.3 of CBDT’s Circular No. 2 of 2018 containing Explanatory Notes to Provisions of Finance Act, 2017 (dated 15 February 2018) is similar to the format of reporting prescribed by CBDT in clause 30B of Form No. 3CD. The better view is to disclose interest paid only to non-resident AE(s).

In item (ii) of sub-clause (b), the amount of EBITDA needs to be disclosed. Collins English Dictionary defines EBITDA as “the amount of profit that a person or company receives before interest, taxes, depreciation, and amortisation have been deducted”. Section 94B(2) uses similar terminology. While computing the EBITDA, the figures as per the final audited stand-alone accounts of the company should be considered, and not the figures as adjusted for the income tax computation after various allowances and disallowances.

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

In item (iii) of sub-clause (b), the amount by which the interest as per item (i) exceeds 30% of EBITDA as per item (ii), needs to be given. In case the EBITDA is negative, the entire interest and other similar expenditure as per item (i) need to be given here, without any adjustment for the negative figure, the negative figure being taken as nil.

In item (iv) of sub-clause (b), the details of brought forward excess interest disallowed in earlier years, which has not been allowed as a deduction, and which is available for deduction during the year under audit (without considering the limitation during the year under audit), is required to be given. For this purpose, the tax auditor should verify the computation of income as per the return of income filed or the relevant earlier years. Since section 94B was introduced only with effect from assessment year 2018-19, for the report for assessment year 2018-19, this figure would be nil.

In item (v) of sub-clause (b), the details of carried forward excess interest are to be given. This figure is to be computed after reducing the brought forward excess interest allowable as a deduction during the year under audit, or adding the excess interest of the year, as the case may be. The tax auditor should verify the draft computation of income certified by the management, or the tax advisor, as the case may be. For reporting for assessment year 2018-19, this figure would consist only of the excess interest for assessment year 2018-19, if any.

IX. Clauses 31(ba), (bb), (bc) and (bd)

In serial number 31,-

(A) after clause (b), the following clauses and entries relating thereto shall be inserted, namely:-

“(ba) Particulars of each receipt in an amount exceeding the limit specified in section 269ST, in aggregate from a person in a day or in respect of a single transaction or in respect of transactions relating to one event or occasion from a person, during the

previous year, where such receipt is otherwise than by a cheque or bank draft or use of electronic clearing system through a bank account:-

- (i) Name, address and Permanent Account Number (if available with the assessee) of the payer;
- (ii) Nature of transaction;
- (iii) Amount of receipt (in Rs.);
- (iv) Date of receipt;

(bb) Particulars of each receipt in an amount exceeding the limit specified in section 269ST, in aggregate from a person in a day or in respect of a single transaction or in respect of transactions relating to one event or occasion from a person, received by a cheque or bank draft, not being an account payee cheque or an account payee bank draft, during the previous year:—

- (i) Name, address and Permanent Account Number (if available with the assessee) of the payer;
- (ii) Amount of receipt (in Rs.);

(bc) Particulars of each payment made in an amount exceeding the limit specified in section 269ST, in aggregate to a person in a day or in respect of a single transaction or in respect of transactions relating to one event or occasion to a person, otherwise than by a cheque or bank draft or use of electronic clearing system through a bank account during the previous year:-

- (i) Name, address and Permanent Account Number (if available with the assessee) of the payee;
- (ii) Nature of transaction;
- (iii) Amount of payment (in Rs.);
- (iv) Date of payment;

(bd) Particulars of each payment in an amount exceeding the limit specified in section 269ST, in aggregate to a person in a day or in respect of a single transaction or in respect of transactions relating to one event or occasion to a person, made by a cheque or bank draft, not being an account payee cheque or an account payee bank draft, during the previous year:—

- (i) Name, address and Permanent Account Number (if available with the assessee) of the payee;**
- (ii) Amount of payment (in Rs.);**

(Particulars at (ba), (bb), (bc) and (bd) need not be given in the case of receipt by or payment to a Government company, a banking Company, a post office savings bank, a cooperative bank or in the case of transactions referred to in section 269SS or in the case of persons referred to in Notification No. S.O. 2065(E) dated 3rd July, 2017)”

Section 269ST was introduced by the Finance Act, 2017 with effect from 1 April 2017. It provides that no person shall receive sum of Rs. 2 lakh or more

- a) in aggregate from a person in a day; or
- b) in respect of a single transaction; or
- c) in respect of transactions relating to one event or occasion from a person

otherwise than by an account payee cheque or an account payee demand draft or by use of electronic clearing system through a bank account. Contravention of section 269ST attracts penalty under section 271DA.

The new sub-clauses 31(ba), (bb), (bc) and (bd) deal with reporting of transactions of receipts and payments in excess of the specified limit made otherwise than by the modes specified in section 2 section 269ST.

Provisions of section 269ST do not apply to receipt by Government, any banking company, post office savings bank or a co-operative bank

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

or transactions of loan or deposit or 'specified sum' referred to in section 269SS. 'Specified sum' means any sum of money receivable, whether as an advance or otherwise, in relation to transfer of an immovable property, whether not the transfer takes place. (Refer clause (iv) of the Explanation below section 269SS.)

It also does not apply to such persons or class of persons or receipts, which have been notified by the Central Government. The Central Government has issued two notifications in this respect.

Under Notification No. S.O. 1057(E) [Notification No. 28/2017, F.No.370142/10/2017-TPL] dated 5th April, 2017, provisions of section 269ST do not apply to receipt by *any person* from an entity referred to in sub-clause (b) of clause (i) of the proviso to section 269ST i.e. any banking company, post office savings bank and co-operative bank.

Under Notification No. S.O. 2065(E) [No. 57 /2017, F.No.370142/10/2017-TPL] dated 3 July 2017, the Central Government has specified that the provisions of section 269ST shall not apply to the following receipts:

- a) receipt by a business correspondent on behalf of a banking company or co-operative bank, in accordance with the guidelines issued by the Reserve Bank of India;
- b) receipt by a white label automated teller machine operator from retail outlet sources on behalf of a banking company or co-operative bank, in accordance with the authorisation issued by the Reserve Bank of India under the Payment and Settlement Systems Act, 2007 (51 of 2007);
- c) receipt from an agent by an issuer of pre-paid payment instruments, in accordance with the authorisation issued by the Reserve Bank of India under the Payment and Settlement Systems Act, 2007 (51 of 2007);
- d) receipt by a company or institution issuing credit cards against bills raised in respect of one or more credit cards;

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

- e) receipt which is not includible in the total income under clause (17A) of section 10 of the Income-tax Act, 1961.

Note under sub-clauses 31(ba), (bb), (bc) and (bd) states that the particulars required under these sub-clauses need not be given in case of a receipt by or a payment to a Government company, a banking company, a post office savings bank, cooperative bank or in the case of transactions referred to in section 269SS or in the case of persons referred to in Notification No. S.O. 2065(E) dated 3rd July, 2017. Effectively, particulars are not required to be furnished of transactions to which provisions of section 269ST do not apply. It may however be noted neither the section itself nor the notifications issued under the section exclude a Government company from application of the provisions of section 269ST. However, in view of the note under sub-clauses 31(ba), (bb), (bc) and (bd) particulars required under these sub-clauses need not be given in case of a Government company. On the other hand, provisions of section 269ST do not apply to any receipt by the Government. However, the note under sub-clauses 31(ba), (bb), (bc) and (bd) does not specifically refer to receipt by or payment to Government. Considering the provisions of the section, particulars of the payments made to the government need not be included under sub-clauses (bc) and (bd) and a suitable note may be given to the effect that details of payments made to Government have not been included in the particulars.

Section 269ST does not distinguish between receipt on capital account and revenue account. Similarly, sub-clauses 31(ba), (bb), (bc) and (bd) do not distinguish between receipts and payments on capital account and revenue account. Once the receipt or the payment, as the case may be, exceeds the limit specified in section 269ST, the particulars of such transactions will have to be reported under these clauses. The tax auditor should bear this in mind while examining the books of account and records of the assessee.

Sub-clauses 31(ba), (bb), (bc) and (bd) require particulars to be furnished of receipts or payments, as the case may be, in an amount exceeding the limits specified in section 269ST, in aggregate from a

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

person in a day or in respect of a single transaction or in respect of transactions relating to one event or occasion from a person. Thus, particulars are required to be given if receipts or payments, even though individually are lower than Rs. 2 lakh but in aggregate amount to Rs. 2 lakh or more if such receipts or payments are to or from one person in a day (whether related to a single transaction or otherwise) or relate to a single transaction (even if the receipts or the payments, as the case may be, are on different dates and individual receipts or payments are less than Rs. 2 lakh) or are in respect of more than one transaction but relate to a single event or occasion (even if the receipts or the payments, as the case may be, are on different dates and individual receipts or payments are less than Rs. 2 lakh).

While it is comparatively simple to work out receipts or payments to or from a single person in a day, the tax auditor will have to exercise care and caution while arriving at the particulars of receipts or payments pertaining to a single transaction or relating to a single event or occasion. The tax auditor will need to link all receipts or payments, as the case may be, otherwise than by the modes specified in this section received/made in respect of a single transaction and verify if the aggregate amount exceeds the limits specified in section 269ST. Whether the receipts or payments, as the case may be, are pertaining to a single transaction or different transaction will depend on facts of the case. A single invoice may relate to multiple transactions and vice-versa, multiple bills may relate to a single transaction. The tax auditor will have to exercise his judgement to decide whether the receipts/payments pertaining to a single transaction.

Similarly, the tax auditor will have to exercise judgement in deciding whether received/payments though pertaining to more than one transaction, pertain to a single event or occasion. For example, for a function organised by a person, assessee contractor may have been given catering contract as well as contract for flower decoration. In such a case, while the transactions may be different the occasion or event would be the same and provisions of section 269ST will be

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

attracted if the receipts exceeding the limits specified under section 269ST are by mode other than those specified in the section.

A reference may be made to this Circular No. 22 of 2017 (F.No.370142/10/2017-TPL) dated 3rd July 2017. The CBDT, by the circular, has clarified that 'in respect of receipt in the nature of repayment of loan by NBFCs or HFCs, the receipt of one instalment of loan repayment in respect of a loan shall constitute a 'single transaction' as specified in clause (b) of section 269ST of the Act and all the instalments paid for the loan shall not be aggregated for the purposes of determining applicability of the provisions of section 269ST.'

it is possible that the assessee may have purchased goods or services while simultaneously he may have sold goods or services to the same party consideration for which exceeds Rs. 2 lakh. In such a case if the amount of consideration for purchase is set off against the amount receivable for the sale of goods or services, such set off is not a receipt as contemplated under section 269ST. If the amount of such set off exceeds Rs. 2 lakh, the tax auditor may give appropriate note to the effect that such set off not being a receipt or payment has not been included in the particulars given and the relevant sub-clause.

If such receipts or payments are otherwise than by account payee cheque or an account payee draft or by use of electronic clearing system through a bank account, then the tax auditor will have to verify the mode of the receipt of payment, as the case may be. He will have to classify the receipt or the payment, as the case may be, as under:

- (i) otherwise than by the cheque or bank draft or use of electronic clearing system through a bank account, (ii) receipt or payment;
- (ii) by cheque or bank draft not being an account payee cheque or an account payee bank draft.

While section 269ST deals only with receipts exceeding Rs. 2 lakh or more otherwise than by the specified modes, sub-clauses 31(ba), (bb), (bc) and (bd) require details to be furnished of both of receipts and payments.

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

Sub-clause 31(ba) deals with receipts otherwise than by a cheque or bank draft or use of electronic clearing system through a bank account. The details required to be furnished are:

- (i) Name, address and PAN (if available with the assessee) of the payer;
- (ii) Nature of transaction;
- (iii) Amount of receipt;
- (iv) Date of receipt.

Sub-clause 31(bb) deals with receipts by a cheque or bank draft not being an account payee cheque or account payee bank draft. The details required to be furnished are:

- (i) Name, address and PAN (if available with the assessee) of the payer;
- (ii) Amount of receipt.

Sub-clause 31(bc) deals with payments otherwise than by a cheque or bank draft or use of electronic clearing system through a bank account. The details required to be furnished are:

- (i) Name, address and PAN (if available with the assessee) of the payee;
- (ii) Nature of transaction;
- (iii) Amount of receipt;
- (iv) Date of receipt.

Sub-clause 31(bd) deals with payments by a cheque or bank draft not being an account payee cheque or account payee bank draft. The details required to be furnished are:

- (i) Name, address and PAN (if available with the assessee) of the payer;
- (ii) Amount of receipt.

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

In each of the above cases, as discussed earlier, the particulars have to be given of receipts or payments, as the case may be, in an amount exceeding the limits specified in section 269ST, in aggregate from a person in a day or in respect of a single transaction or in respect of transactions relating to one event or occasion from a person.

Where the receipts or the payments, as the case may be, pertain to a single transaction or transactions relating to one event or occasion, such receipts/payments may be grouped together while reporting. The tax auditor may also keep in his record date of the receipts and date of the payments reported under sub-clauses 31(bb) and 31(bd), although not required to be reported under the said sub-clauses.

Where payment is made by cheque or demand draft there will be practical difficulties in verifying whether the relevant receipt or payment is by account payee cheque or account payee draft. In such cases, the tax auditor should verify the transactions with reference to such evidence which may be available. In the absence of satisfactory evidence, the guidance given by the Council of the Institute of Chartered Accountants of India in similar cases to the tax auditors has been to make a suitable comment. (Refer para 49.6 of the 'Guidance Note on Tax Audit under section 44AB of the Income-tax Act, 1961' 2014 Edition.) The tax auditor, in his report may make comment as suggested below while reporting under sub-clauses 31(bb) and 31(bd):

"It is not possible for me/us to verify whether the receipts/payments have been accepted/made otherwise than by an account payee cheque or an account payee bank draft, as necessary evidence is not in the position of the assessee".

The tax auditor should maintain the following information in his working papers for the purpose of reporting of receipts under the sub-clauses 31(ba) and (bb):

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

S. N.	Name of the payer	Address of the payer	PAN of the payer, if available	Date of receipt	Amount of receipt	Mode of payment		Transaction /Document/ Event reference
						Whether other-wise than by cheque, bank draft or electronic mode	Whether other-wise than by account payee cheque, account payee bank draft	

The tax auditor should maintain the following information in his working papers for the purpose of reporting of payments under the sub-clauses 31(bc) and (bd):

S. N.	Name of the payee	Address of the payee	PAN of the payee, if available	Date of receipt	Amount of receipt	Mode of payment		Transaction /Document/ Event reference
						Whether other-wise than by cheque, bank draft or electronic mode	Whether other-wise than by account payee cheque, account payee bank draft	

X. Clauses 31(c), (d) and (e)

Amendment to clause no. 31(c),(d),(e):

- (B) in item (c), in sub-item (v), for the words “taken or accepted”, the word “repaid” shall be substituted;

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

- (C) in item (d), in sub-item (ii), after the words “amount of”, the words “repayment of” shall be inserted;
- (D) in item (e), in sub-item (ii), after the words, “amount of”, the words “repayment of” shall be inserted;

After amendment, the revised clause appears as follows:

- (c) **Particulars of each repayment of loan or deposit or any specified advance in an amount exceeding the limit specified in section 269T made during the previous year:—**
 - (i) name, address and Permanent Account Number (if available with the assessee) of the payee;
 - (ii) amount of the repayment;
 - (iii) maximum amount outstanding in the account at any time during the previous year;
 - (iv) whether the repayment was made by cheque or bank draft or use of electronic clearing system through a bank account;
 - (v) in case the repayment was made by cheque or bank draft, whether the same was *repaid* by an account payee cheque or an account payee bank draft.
- (d) **Particulars of repayment of loan or deposit or any specified advance in an amount exceeding the limit specified in section 269T received otherwise than by a cheque or bank draft or use of electronic clearing system through a bank account during the previous year:—**
 - (i) name, address and Permanent Account Number (if available with the assessee) of the lender, or depositor or person from whom specified advance is received;
 - (ii) *repayment of* loan or deposit or any specified advance received otherwise than by a cheque or bank

draft or use of electronic clearing system through a bank account during the previous year.

- (e) Particulars of repayment of loan or deposit or any specified advance in an amount exceeding the limit specified in section 269T received by a cheque or bank draft which is not an account payee cheque or account payee bank draft during the previous year:—
- (i) name, address and Permanent Account Number (if available with the assessee) of the lender, or depositor or person from whom specified advance is received;
 - (ii) *repayment of loan or deposit or any specified advance received by a cheque or a bank draft which is not an account payee cheque or account payee bank draft during the previous year.*

(Particulars at (c), (d) and (e) need not be given in the case of a repayment of any loan or deposit or any specified advance taken or accepted from the Government, Government company, banking company or a corporation established by the Central, State or Provincial Act).

Clause 31 was substituted by IT (Eighteenth Amendment) Rules, 2017 w.e.f. 19 July 2017. Inadvertently in sub-clauses 31(c), (d) and (e) there were certain errors which have now been rectified.

XI. Clause 34(b)

This sub-clause has been substituted with new sub-clause 34(b) which reads as under:

“(b) whether the assessee is required to furnish the statement of tax deducted or tax collected. If yes, please furnish the details:

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

Tax deduction and collection Account Number (TAN)	Type of Form	Due date for furnishing	Date of furnishing,	Whether the statement of tax deducted or collected contains information about all details/transactions which are required to be reported. If not, please furnish list of details/transactions which are not reported

It deals with information pertaining to statement of tax deducted at source and tax collected source. Before its substitution, the clause required the tax auditor to furnish information whether the assessee had furnished the statement of tax deducted and tax collected at source within the prescribed time. If the assessee had failed to furnish the statement of tax deducted at source or tax collected at source within the prescribed time then, the tax auditor was also required to state whether the statement of tax deducted or collected contained information about all transaction which were required to be reported. No further details were required to be furnished. The reporting requirement under the sub-clause arose only where the assessee had either not furnished or furnished the statement of tax deducted or tax collected after the expiry of the prescribed time.

The substituted sub-clause widens the scope considerably of the reporting requirements so far as information about details and transactions required to be reported in the statement of tax deducted at source and tax collected at source.

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

Under the substituted sub-clause, the tax auditor is required to furnish a list of details/transactions which are not reported in the statement of tax deducted at source and statement of tax collected at source. The reporting requirement is notwithstanding the fact that the assessee has furnished the statements of tax deducted at source and tax collected at source within the prescribed time.

Thus, the tax auditor will have to identify the transactions in respect of which tax was required to be deducted at source or collected at source and verify whether these transactions have been appropriately reported in the relevant form of the statement of tax deducted at source or tax collected at source.

Wherever there is failure to report the transaction in the statement of tax collected or deducted at source the tax auditor will have to report the same.

As stated in paragraph 59.2 of the 'Guidance Note on Tax Audit under Section 44AB of the Income-tax Act, 1961' (Edition 2014), the tax auditor should take into consideration the relevant sections, rules, notifications, circulars and various judicial pronouncements in relation to transactions of relevant payments or collections. There may be occasions when the tax auditor may not agree with the interpretation/view taken by the auditee. In such cases the tax auditor may report about the views as observation in clause (3) of Form No. 3CA or clause (5) of Form No. 3CB, as the case may be.

XII. Clause 36A – Dividend Chargeable under section 2(22)(e)

After serial number 36 and the entries relating thereto, the following shall be inserted, namely:

36A. (a) Whether the assessee has received any amount in the nature of dividend as referred to in sub-clause (e) of clause (22) of section 2? (Yes/No)

(b) If yes, please furnish the following details:-

(i) Amount received (in Rs.):

(ii) Date of receipt:

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

Clause 36A has been newly introduced in Form No. 3CD. Clause 22 of section 2 defines the term 'dividend' in an inclusive manner. Sub-clause (e) deems certain payments to be dividend. Main conditions for attracting the provisions of the sub-clause (e) are as under:

- (i) Payment should be by a company in which public are not substantially interested (referred here as 'closely held company');
- (ii) Payment should be by way of advance or loan or the payment should be on behalf, or for the individual benefit, of the shareholder;
- (iii) The shareholder must be a person who is the beneficial owner of shares holding not less than 10% of the voting power. It may be noted that for considering the 10% of the voting power what is relevant is the shareholding of the assessee alone and shareholding of his relatives is not required to be considered;
- (iv) Payment by way of advance or loan should be to the shareholder or any concern in which the shareholder is a member or a partner and in which he has substantial interest;
- (v) The company making the payment should have accumulated profits. The amount of dividend is restricted to the extent to which the company possesses accumulated profits.

The accumulated profits are to be computed up to the date of payment after considering provisions of Explanation 1, Explanation 2 and Explanation 2A below section 2 (22). Explanation 3 defines the term 'concern' to include a Hindu undivided family, or a firm or an association of persons or a body of individuals or a company. A person is deemed to have a substantial interest in a concern (other than or company) if he is, at any time during the previous year, beneficially entitled to not less than 20% of the income of such concern. Section 2(32) defines the term 'person who has substantial interest in the company' to mean a person who is the beneficial owner of shares (not being shares entitled to fixed rate of dividend) carrying not less than 20% of the voting power.

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

It may be noted that even if the loan or advance is made by the closely held company to the concern, it is chargeable to tax in the hands of the shareholder and not in the hands of the concern. In this respect a reference may be made to the decision of the Supreme Court in the case of CIT v Madhur Housing & Development Co. (Civil Appeal 3961 of 2013) confirming decision of Delhi High Court in the case of CIT v Ankitech (P) Ltd. 340 ITR 14 (Delhi). A reference may also be made to the decision of the Bombay Court in the case of CIT v Universal Medicare Pvt. Ltd. 324 ITR 263 (Bom). In order to enable reporting under this clause, the tax auditor should obtain from the assessee a certificate containing list of closely held companies in which he is beneficial owner of shares carrying not less than 10% of the voting power and list of concerns in which he has substantial interest. The tax auditor should also obtain a certificate from the assessee giving particulars of any loans or advances received by any concern in which he has substantial interest from any closely held company in which he is beneficial owner of shares carrying not less than 10% voting power. These certificates are necessary since the tax auditor may not be able to verify the above from the books of account of the assessee. The tax auditor should include appropriate remarks of his inability to independently verify the information and reliance on the certificates obtained from the assessee. These remarks may be included in clause (3) of Form No. 3CA or clause (5) of Form 3CB, as the case may be.

The tax auditor should also verify Form 26AS in the case of the assessee to know if the closely held company has deducted tax at source from any payment made by it to the assessee or the concern under section 194. This will indicate the view taken by the closely held company making the payment. The tax auditor may consider the same before coming to a conclusion.

So far as any payment by the closely held company made on behalf of or for the individual benefit of the assessee is concerned, there may not be any record available for the auditor to verify the same. In such a case auditor may make appropriate remarks in clause (3) of Form No. 3CA or clause (5) of Form 3CB, as the case may be. It may be

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

noted that if the closely held company has made payment on behalf of or for the individual benefit of the assessee in his capacity, say, as the managing director of the closely held company and if such payment has been considered as part of the assessee's remuneration, the same payment is not again chargeable to tax under section 2(22)(e) and is not required to be reported under this clause.

Whether an amount is chargeable to tax as dividend under section 2(22)(e) has been always subject matter of litigation before various judicial forums. The tax auditor needs to consider various issues while reporting under this clause. Some of these issues are as under:

- (a) For attracting section 2(22)(e), it is necessary that the assessee receiving a loan or advance should be a shareholder. In this context, in the case of CIT v C.P. Sarathy Mudaliar 83 ITR 170 (SC), the Supreme Court had held that when the section speaks of 'shareholder', it refers to the registered shareholder and not to the beneficial owner. The HUF cannot be considered as a shareholder. Hence a loan given to a HUF cannot be considered as a loan advanced to a 'shareholder' of a company. This decision was followed by the Supreme Court in the case of Rameshwari Lal Sanwormal v CIT 122 ITR 1 (SC). In 1988, however, the definition of dividend was amended and the concept of beneficial shareholder holding not less than 10% of voting power has been introduced. Also the loan to a concern in which such beneficial shareholder holds substantial interest has now been covered. Accordingly, the Supreme Court in the case of Gopal and Sons (HUF) v CIT 391 ITR 1 (SC) has held that HUF is a concern to which the provisions of section 2(22)(e) will apply.

Even after this amendment of 1988, Delhi High Court in the case of CIT v Ankitech (P) Ltd. 340 ITR 14 (Delhi) held that the amended provisions do not in any way alter the position that the shareholder has to be a registered shareholder. It followed the earlier decision of the Supreme Court in the case of C.I.T. v C.P. Sarathy Mudaliar. The decision of the Delhi High Court was

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

confirmed in CIT v Madhur Housing & Development Co. (Civil Appeal 3961 of 2013). However, the Supreme Court in the case of National Travel Services V CIT 401 ITR 154 (SC) expressed that the decision in the case of CIT v Ankitech (P) Ltd. needs reconsideration and has referred the matter to the Chief Justice of India in order to constitute an appropriate Bench of three learned Judges in order to have a relook at the entire question.

In the light of the above position, wherever the beneficial shareholder is not the registered shareholder and the closely held company has given loan or advance to the beneficial shareholder or to a concern, the tax auditor should make appropriate remark about the basis of reporting in clause (3) of Form No. 3CA or clause (5) of Form 3CB, as the case may be.

- (b) Under the provisions of section 2(22), dividend does not include any advance or loan made to a shareholder or the concern by a company in the ordinary course of its business, where the lending of money is a substantial part of the business of the company. The term 'substantial part' has not been defined in the Act. In various decisions it has been held that the expression 'substantial part' does not connote an idea of being the 'major part' or the part that constitutes majority of the whole. It depends on various factors. Some of the decisions have held that 'substantial part' would indicate 20% i.e. where 20% or more funds have been deployed in the business of lending money the test of substantial part will be satisfied. In this respect a reference may be made to the following decisions:
- (i) Tanuj Holdings (P.) Ltd. V DCIT 46 ITR(T) 420 (Kolkata - Trib.)
 - (ii) Mrs. Rekha Modi v ITO 13 SOT 512 (Delhi)
 - (iii) DCIT v Kishori Lal Agarwal 150 ITD 741 (Lucknow - Trib.)
 - (iv) CIT v Parle Plastics Ltd. 332 ITR 63 (Bom)
 - (v) CIT v Jayant H. Modi 232 Taxman 337 (Bom)

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

- (vi) CIT v Shree Balaji Glass Manufacturing (P.) Ltd. 386 ITR 128 (Cal)
- (c) As mentioned earlier, the dividend taxable under section 2(22)(e) is restricted to accumulated profits on the date of payment. Thus, the accumulated profits have to be determined as on the date of the payment. Further, if at any time earlier any amount has been taxed under any of the clauses of section 2(22), the accumulated profits will have to be reduced by the amount so taxed.
- (d) The tax auditor may not be able to determine the accumulated profits of the closely held company making the payment for various reasons. He will not have access to the records of such closely held company, the payment would often be during the course of a financial year and accounts will not have been made up as of the date of payment. The tax auditor in such a case may arrive at the accumulated profits by appropriating the profit for the year on a time basis. In such a case the auditor should include appropriate remarks in clause (3) of Form No. 3CA or clause (5) of Form 3CB, as the case may be, about the methodology adopted by him.
- (e) There may be business transactions between the closely held company and the concerns in which the assessee has substantial interest. Various courts have held that trade advances in the nature of commercial transactions would not fall within the ambit of the provisions of section 2(22)(e). The Central Board of Direct Taxes has issued Circular No. 19/2017 (F.No.279IMisc.1140/2015I1TJ) dated 12 June 2017 accepting this position. The circular gives various illustrations and citation of judicial decisions. Considering the circular, business advance or trade advances from closely held companies to the assessee or concerns in which the assessee has substantial interest are out of the purview of 2(22)(e) and need not be reported as dividend under this clause of Form No. 3CD.

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

- (f) The assessee or the concern may maintain two accounts of the closely held company in its books of account. Amounts received from the closely held company and the amount receivable from the closely held company may be accounted in two separate accounts. In such case the tax auditor will have to consider whether for reporting under this clause only net amount should be considered.
- (g) The assessee or the concern may have current account of the closely held company in its books of account. In such a case there could be various transactions accounted for in such current account. The tax auditor will have to consider if all the transactions in such a current account are on account of normal business transactions or the transactions are in the nature of loans or advances received by the assessee or the concern.

Considering various judicial decisions, the tax auditor will have to take a considered view while reporting under this clause. If reliance has been placed on any judicial decision, a reference of the same may be given by the tax auditor as observations in clause (3) of Form No. 3CA or clause (5) of Form 3CB, as the case may be.

Under the clause 36A, the tax auditor has to report:

Whether the assessee has received any amount in the nature of dividend as referred to in sub-clause (e) of clause (22) of section 2;

If yes, the amount received and the date of receipt.

It may be noted that any payment made after 1 April 2018 which satisfies the conditions of sub-clause (e) of clause (22) of section 2, would be subject to Dividend Distribution Tax under section 115-O in the hands of the company making the payment and not in the hands of the shareholder.

XIII. Clause 42 – Furnishing of Form 61, 61A and 61B

After serial number 41 and the entries relating thereto, the following shall be inserted, namely:-

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

42. (a) Whether the assessee is required to furnish statement in Form No.61 or Form No. 61A or Form No. 61B? (Yes/No)

(b) If yes, please furnish:

Income-tax Department Reporting Entity Identification Number	Type of Form	Due date for furnishing	Date of furnishing, if furnished	Whether the Form contains information about all details/ transactions which are required to be reported. If not, please furnish list of the details/transactions which are not reported.

Clause 42 has been newly introduced in Form No. 3CD.

Form No. 61 - Under section 139A(5)(c) every person is required to quote his Permanent Account Number (PAN) in all documents pertaining to prescribed transactions entered into by him. Relevant rules are 114B, 114C and 114D. Rule 114B prescribes transactions where quoting of PAN is mandatory. Second proviso to Rule 114B provides that any person who does not have PAN and who enters into a prescribed transaction, shall make a declaration in Form No. 60. Rule 114D contains provision regarding filing of Form No. 61.

Form No. 61 is to be filed by certain persons who have received any declaration in Form No.60. Persons who have to file Form No. 61 are (i) persons referred to in Rule 114C(1)(a) to (k), (ii) persons raising bill in respect of payment made in cash for amount exceeding Rs. 50,000 to a hotel or restaurant, (iii) persons raising bill in connection with foreign travel or purchase of foreign currency payment for which payment is made in cash for an amount exceeding Rs. 50,000, and (iv) person raising bill in respect of transactions of sale or purchase of goods or services other than those specified at serial numbers 1 to 17

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

of the Table in Rule 114B where value of the transaction exceeds Rs. 2 lakhs.

Form No. 61 is to be filed by 31st October where declarations in Form No. 60 have been received before 30 September; and by 30th April where declarations in Form No. 60 have been received by 31st March of the immediately preceding financial year. Form No. 61 is to be filed through online transmission of electronic data to a server designated for this purpose.

The tax auditor should verify whether the assessee has entered into any transaction where the other party was required to quote PAN. He should verify whether the assessee has obtained declaration in Form No. 60 where the other party has not furnished his PAN. Wherever the assessee has received declarations in Form No. 60, the auditor should verify if the assessee has filed Form No. 61 including therein all the necessary particulars.

Form No. 61A - Under section 285BA an assessee and certain other specified/prescribed persons are required to furnish a statement in respect of specified financial transactions. The statement in respect of specified financial transactions is to be furnished to the Director of Income-tax (Intelligence and Criminal Investigation) or Joint the Director of Income-tax (Intelligence and Criminal Investigation) in Form No. 61A. The relevant rule is Rule 114E.

Rule 114E provides that statement of financial transactions required to be furnished under section 285BA shall be furnished in Form No. 61A. The statement is to be furnished in respect of the financial year on or before 31st May of the immediately following financial year. Table in sub-rule (2) gives the nature and value of transaction in respect of which the statement is required to be filed and persons who are required to file the statement. This is reproduced below.

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

Sl. No.	Nature and value of transaction	Class of person (reporting person)
(1)	(2)	(3)
1.	<p>(a) <i>Payment made in cash for purchase of bank drafts or pay orders or banker's cheque of an amount aggregating to ten lakh rupees or more in a financial year.</i></p> <p>(b) <i>Payments made in cash aggregating to ten lakh rupees or more during the financial year for purchase of pre-paid instruments issued by Reserve Bank of India under section 18 of the Payment and Settlement Systems Act, 2007 (51 of 2007).</i></p> <p>(c) <i>Cash deposits or cash withdrawals (including through bearer's cheque) aggregating to fifty lakh rupees or more in a financial year, in or from one or more current account of a person.</i></p>	<p><i>A banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949) applies (including any bank or banking institution referred to in section 51 of that Act).</i></p>
2.	<p><i>Cash deposits aggregating to ten lakh rupees or more in a financial year, in one or more accounts (other than a current account and time deposit) of a person.</i></p>	<p>(i) <i>A banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949) applies (including any bank or banking institution referred to in section 51 of that Act);</i></p> <p>(ii) <i>Post Master General¹⁰ as referred to in clause (j) of section 2 of the Indian Post Office Act, 1898 (6 of 1898).</i></p>

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

3.	<p><i>One or more time deposits (other than a time deposit made through renewal of another time deposit) of a person aggregating to ten lakh rupees or more in a financial year of a person.</i></p>	<p>(i) A banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949) applies (including any bank or banking institution referred to in section 51 of that Act);</p> <p>(ii) Post Master General as referred to in clause (j) of section 2 of the Indian Post Office Act, 1898 (6 of 1898);</p> <p>(iii) Nidhi referred to in section 406 of the Companies Act, 2013 (18 of 2013);</p> <p>(iv) Non-banking financial company which holds a certificate of registration under section 45-IA of the Reserve Bank of India Act, 1934 (6 of 1934), to hold or accept deposit from public.</p>
4.	<p><i>Payments made by any person of an amount aggregating to—</i></p> <p><i>(i) one lakh rupees or more in cash; or</i></p> <p><i>(ii) ten lakh rupees or more by any other mode, against bills raised in respect of one or more credit cards issued to that person, in a financial year.</i></p>	<p><i>A banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949) applies (including any bank or banking institution referred to in section 51 of that Act) or any other company or institution issuing credit card.</i></p>
5.	<p><i>Receipt from any person of an amount aggregating to ten lakh rupees or more in a financial year for acquiring bonds or debentures issued by the company or institution (other than the amount received on account of renewal of the bond or debenture issued by that company).</i></p>	<p><i>A company or institution issuing bonds or debentures.</i></p>

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

6.	<i>Receipt from any person of an amount aggregating to ten lakh rupees or more in a financial year for acquiring shares (including share application money) issued by the company.</i>	<i>A company issuing shares.</i>
7.	<i>Buy back of shares from any person (other than the shares bought in the open market) for an amount or value aggregating to ten lakh rupees or more in a financial year.</i>	<i>A company listed on a recognised stock exchange purchasing its own securities under section 68 of the Companies Act, 2013 (18 of 2013).</i>
8.	<i>Receipt from any person of an amount aggregating to ten lakh rupees or more in a financial year for acquiring units of one or more schemes of a Mutual Fund (other than the amount received on account of transfer from one scheme to another scheme of that Mutual Fund).</i>	<i>A trustee of a Mutual Fund or such other person managing the affairs of the Mutual Fund as may be duly authorised by the trustee in this behalf.</i>
9.	<i>Receipt from any person for sale of foreign currency including any credit of such currency to foreign exchange card or expense in such currency through a debit or credit card or through issue of travellers cheque or draft or any other instrument of an amount aggregating to ten lakh rupees or more during a financial year.</i>	<i>Authorised person as referred to in clause (c) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999).</i>

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

10.	<i>Purchase or sale by any person of immovable property for an amount of thirty lakh rupees or more or valued by the stamp valuation authority referred to in section 50C of the Act at thirty lakh rupees or more.</i>	<i>Inspector-General appointed under section 3 of the Registration Act, 1908 or Registrar or Sub-Registrar appointed under section 6 of that Act.</i>
11.	<i>Receipt of cash payment exceeding two lakh rupees for sale, by any person, of goods or services of any nature (other than those specified at Sl. Nos. 1 to 10 of this rule, if any.)</i>	<i>Any person who is liable for audit under section 44AB of the Act.</i>
12.	<i>Cash deposits during the period 09th November, 2016 to 30th December, 2016 aggregating to— (i) twelve lakh fifty thousand rupees or more, in one or more current account of a person; or (ii) two lakh fifty thousand rupees or more, in one or more accounts (other than a current account) of a person.</i>	<i>(i) A banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949) applies (including any bank or banking institution referred to in section 51 of that Act); (ii) Post Master General as referred to in clause (j) of section 2 of the Indian Post Office Act, 1898 (6 of 1898).</i>
13.	<i>Cash deposits during the period 1st of April, 2016 to 9th November, 2016 in respect of accounts that are reportable under Sl.No.12.</i>	<i>(i) A banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949) applies (including any bank or banking institution referred</i>

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

		<i>to in section 51 of that Act);</i> <i>(ii) Post Master General as referred to in clause (j) of section 2 of the Indian Post Office Act, 1898 (6 of 1898).</i>
--	--	---

The Rule 114E(3) provides for aggregation of amounts for arriving at the threshold limit for reporting (by persons other than at Sl.No.10 and Sl.No.11). Accordingly, to arrive at the threshold limits - (i) all accounts of the same nature in respect of one person have to be aggregated; (ii) all transactions of the same nature in respect of one person have to be aggregated; (iii) where in a single transaction more than one person is involved, the entire value of the transaction is to be considered. Further, in case the account or transaction is recorded in the name of more than one person the aggregated value of all transactions is to be considered; and (iv) however, while considering cash deposits and cash withdrawals aggregating to Rs. 50 lakh or more in a financial year from one or more current account of a person, the threshold limit is to be applied separately for cash deposits and cash withdrawals. The statement in Form No. 61A is to be furnished through online transmission of electronic data under digital signature of the specified person.

The tax auditor should ascertain whether the assessee is required to report any transactions under section 285BA read with Rule 114E. It may be noted that specified transactions include issue of bonds, issue of shares buyback of shares by a listed company. These transactions may not happen every year and hence special attention should be given in the year when a company assessee issues any security or a listed company undertakes buyback of shares. Specified transactions include receipt of cash payment exceeding Rs. 2 lakh for sale by any person (who is liable for audit under section 44AB) of goods and services of any nature other than those specified at serial numbers 1 to 10 in the Table in sub-rule (2). The tax auditor should verify whether the assessee has received more than Rs. 2 lakh in cash in the financial year for sale of goods and services, without applying rule of

aggregation.

Form No. 61B

USA, in 2010, enacted a law known as “Foreign Account Tax Compliance Act” (FATCA) with the objective of checking tax evasion. The provisions of FATCA required Foreign Financial Institutions to provide information about accounts held with them by USA persons or entities (firms/companies/trusts) controlled by USA persons. Since domestic laws of sovereign countries (including India) may not permit sharing of client confidential information by Financial Institutions directly with USA, USA entered into Inter-Governmental Agreement (IGA) with various countries including India. The IGA between India and USA was signed on 9th July, 2015. It provides that the Indian Financial Institutions will provide necessary information to the Indian tax authorities, which will then be furnished to USA periodically. In turn, USA will also provide information about Indians having financial assets in USA.

India has also faced the problem of tax evasion. Large amount of unaccounted income and money is kept abroad. Combating this requires cooperation amongst tax authorities of various countries. The G20 and OECD countries together have developed a Common Reporting Standard (CRS) on Automatic Exchange of Information (AEOI). It provides for exchange of information between countries adopting CRS. The CRS on AEOI requires the financial institutions of the “source” jurisdiction to collect and report information to their tax authorities about account holders “resident” in other countries. The information to be exchanged relates not only to individuals but also to ‘shell’ companies and trusts having beneficial ownership or interest in the “resident” countries.

With a view to implement the IGA and the CRS on AEOI, by Notification No. 62 of 2015 [F. No. 142/21/2015 TPL] dated 7th

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

August, 2015 rules 114F to 114H and Form 61B were inserted requiring maintenance and reporting information about 'Reportable Accounts' by 'Reporting Financial Institutions'.

Rule 114F defines various terms, Rule 114G prescribes the information to be maintained and reported and Rule 114H prescribes the due diligence requirements.

Central Board of Direct Taxes has issued a detailed Guidance Note on FATCA and CRS. Its 4th version was released on 30th November 2016. The Tax Auditor should refer to the same.

The process of reporting 'Reportable Accounts' consists of the following steps:

- Identifying a Reporting Financial Institution (RFI)
- Reviewing the Financial accounts of RFI
- Identifying the Reportable Accounts by applying due diligence rules
- Report the relevant information in respect of identified Reportable Accounts in Form 61B.

Rule 114F(7) defines RFI as under:

- (a) A financial institution which is resident in India, but excludes any branch of such institution that is located outside India; and
- (b) Any branch of a financial institution (other than a non-reporting Financial Institution) which is not resident in India, if that branch is located in India.

Financial Institution will not include Non-reporting Financial Institutions even though they satisfy the above conditions.

Only 'Entities' can be RFI. The term "Entity" would include legal persons and legal arrangements, such as corporations, partnerships, trusts, foundations and HUF. Individuals, including sole proprietorships, are not RFIs.

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

Rule 114F(3) defines 'Financial Institution' as:

"financial institution" means a custodial institution, a depository institution, an investment entity, or a specified insurance company." The Explanation to the sub-rule (3) explains the four types of financial institutions.

Custodial Institution – A Custodial Institution is defined in Explanation (a) to Rule 114F(3) to mean any entity that holds, as a substantial portion of its business, financial assets for the account of others and where its income attributable to the holding of financial assets and related financial services equals or exceeds twenty percent of its gross income during the three financial years that end on 31 March prior to the year in which determination is made or the period during which the entity has been in existence, whichever period is less.

Entities such as central securities depositories (CSDL and NSDL), custodian banks, brokers, and depository participants, would generally be considered as custodial institutions.

Depository Institution – Explanation (b) to Rule 114F(3) defines a Depository Institution to mean any entity that accepts deposits in the ordinary course of a banking or similar business.

An entity is considered to be engaged in a "banking or similar business" if, in the ordinary course of its business with customers, it regularly engages in activities such as:

- (a) Accepts deposits or other similar investments of funds;
- (b) Makes personal, mortgage, industrial, or other loans or provides other extensions of credit;
- (c) Purchases, sells, discounts, or negotiates accounts receivable, instalment obligations, notes, drafts, checks, bills of exchange, acceptances, or other evidences of indebtedness;
- (d) Issues letters of credit and negotiates drafts drawn thereunder;
- (e) Provides trust or fiduciary services;
- (f) Finances foreign exchange transactions; or

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

- (g) Enters into, purchases, or disposes of finance leases or leased assets.

Savings banks, commercial banks, savings and loan associations, credit unions, and Non-Banking Financial Companies (NBFCs) would generally be considered as Depository Institutions.

Investment Entity – Under Explanation (c) to Rule 114F(3) there are two types of investment entities:

- (i) Entity's whose primary business consists of one or more of the following activities for or on behalf of a customer, namely:
- Trading in money market instruments (cheques, bills, certificates of deposit, derivatives, etc.), foreign exchange, exchange, interest rate and index instruments, transferable securities or commodity futures trading; or
 - individual and collective portfolio management; or
 - otherwise investing, administering, or managing financial assets or money on behalf of other persons; and

the gross income from such business activities is equal or more than 50% of the gross income over a three-year period.

- (ii) Entity's whose primary income is attributable to business of investing, reinvesting, or trading in financial assets and such entity is managed by another entity that is a depository institution, a custodial institution, an investment entity referred in (i) above or a specified insurance company and the gross income of the entity from such business activities is more than 50% of the entities gross income over a three-year period.

Exception

An investment entity established in India that is a financial institution, will be treated as Non-Reporting Financial Institution (discussed later), if it only:

- (a) renders investment advice to, and acts on behalf of; or

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

(b) manages portfolios for, and acts on behalf of; or

(c) executes trades on behalf of,

a customer for the purposes of investing, managing, or administering funds or securities deposited in the name of the customer with a financial institution other than a non-participating financial institution.

Specified Insurance Company – Explanation (d) to Rule 114F(3) defines a Specified Insurance Company to mean any entity that is an insurance company (or the holding company of an insurance company) that issues, or is obligated to make payments with respect to, a Cash Value Insurance Contract or an Annuity Contract.

A “cash value insurance contract” is defined in Explanation (f) of Rule 114F(1) and it means an insurance contract (other than an indemnity reinsurance contract between two insurance companies) that has a cash value. For US Reportable account, a threshold of USD 50,000 has been provided.

Annuity contract has been defined in Explanation (e) of Rule 114F(1) to mean a contract under which the issuer agrees to make payments for a period of time determined in whole or in part by reference to the life expectancy of one or more individuals.

A single premium life insurance contract which does not permit an amount to be paid on surrender or termination of the contract and which does not allow amounts to be borrowed under or with regard to the contract, shall not constitute a cash value insurance contract.

Insurance companies that only provide general insurance or term life insurance are not regarded as Financial Institutions. Also, reinsurance companies that only provide indemnity reinsurance contracts are not regarded as Financial Institutions.

If a reporting entity qualifies for more than one category of financial institutions [e.g. (i) Depository Institution (ii) Custodial Institution] then the reporting entity should get registered for all different categories and submit different Form 61B for different type of financial institutions.

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

There may be a situation in which one FI maintains more than one type of accounts for example both Depository as well as Custodial account, however, the FI may qualify as only one type of financial institution. In such a case, FI shall register only as one type of financial institution but will report both the types of accounts.

Only the Financial Institutions resident in India, their branches located in India and branches of Foreign Financial Institutions that are located in India are RFI. Foreign Financial Institutions, their foreign branches and foreign branches of Indian Financial Institutions are not treated as RFI. In the case of Trusts, the reporting requirement is on the Trustees resident in India, unless the required information is being reported elsewhere because the trust is treated as resident there.

Certain entities though Indian Financial Institutions, are not required to report. These are referred to as Non-reporting Financial Institutions (NRFIs). Rule 114F(5) defines non-reporting financial institutions to mean:

- (a) A Governmental entity, International Organisation or Central Bank;
- (b) A Treaty Qualified Retirement Fund; a Broad Participation Retirement Fund; a Narrow Participation Retirement Fund; or a Pension Fund of a Governmental entity, International Organization or Central Bank;
- (c) A non-public fund of the armed forces, Employees' State Insurance Fund, a gratuity fund or a provident fund;
- (d) an entity that is an Indian financial institution only because it is an investment entity, provided that each direct holder of an equity interest in the entity is a financial institution referred to in sub-clauses (a) to (c);
- (e) A qualified credit card issuer;
- (f) An investment entity established in India that is a financial institution only because it (i) renders investment advice to, and acts on behalf of; or (ii) manages portfolios for, and acts on behalf of; or (iii) executes trades on behalf of, a customer for the

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

- purposes of investing, managing, or administering funds or securities deposited in the name of the customer with a financial institution other than a non-participating financial institution;
- (g) an exempt collective investment vehicle;
 - (h) A trust established under any law for the time being in force to the extent that the trustee of the trust is a reporting financial institution and reports all information required to be reported under Rule 114G with respect to all reportable accounts of the trust;
 - (i) a financial institution with a local client base;
 - (j) a local bank;
 - (k) a financial institution with only low-value accounts;
 - (l) sponsored investment entity and controlled foreign corporation, in case of any U.S. reportable account;
 - (m) sponsored closely held investment vehicle, in case of any U.S. reportable account.

For the purpose of the audit under section 44AB of the Act, the tax auditor should verify whether the assessee is an RFI as defined in the Rule 114F. If the assessee is RFI and not a non-reporting financial institution, further procedures should be carried out.

Having decided that the entity is an RFI, the next step is to review the financial accounts of the RFI. Term 'financial account' is defined in Rule 114F(1). Broadly there are five types of financial accounts. Following Table shows the types of accounts and the financial institutions that generally maintain them.

Accounts	Financial Institution generally considered to maintain them
Depository Accounts	The Financial Institution that is obligated to make payments with respect to the account (excluding an agent of a Financial Institution).

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

Custodial Accounts	The Financial Institution that holds custody over the assets in the account.
Equity and debt interest in certain Investment Entities	The equity or debt interest in a Financial Institution is maintained by that Financial Institution.
Cash Value Insurance Contracts	The Financial Institution that is obligated to make payments with respect to the contract.
Annuity Contracts	The Financial Institution that is obligated to make payments with respect to the contract.

RFI has to identify the Financial Accounts maintained by it. These accounts are then to be reviewed to identify whether any of them are Reportable Accounts. If any of the financial account is found to be reportable account, information in relation to those accounts must be reported in Form 61B.

A Reportable Account generally means an account, which has been identified pursuant to the due diligence procedure, as held by

- (a) a reportable person; or
- (b) an entity, not based in United States of America, with one or more controlling persons that is a specified U.S. person; or
- (c) a passive non-financial entity (passive NFE) with one or more controlling persons that is a person described in sub-clause (b) of clause (8) of the rule 114F.

Thus, an account can be a Reportable Account by virtue of the Account Holder or by virtue of the Account Holders' Controlling Persons.

Identification of Reportable Accounts is done by carrying out due diligence procedures referred in Rule 114H. RFIs are required to record the date of identification of account as reportable account for

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

audit/compliance purposes. There are different due diligence procedures for the accounts held by individuals and accounts held by entities. The accounts are also classified as pre-existing accounts and new accounts. There are separate due diligence procedures for Pre-existing and new accounts. The due diligence procedure is also dependent on balance/value of the financial account. Based on the balance/value, accounts are also classified High value and Low value accounts.

The tax auditor should review the due diligence procedures carried out by the assessee in accordance with provisions of Rule 114H and the results of the such procedures. The due diligence procedures carried out are the basis for identification of the Reportable Accounts.

He should review the list of Reportable Accounts identified by the due diligence process and the information to be maintained and reported by the assessee. Rule 114H prescribes the information to be maintained and reported. For the calendar year 2017 and subsequent years it is as under:

- (a) the name, address, taxpayer identification number (assigned to the account holder by the country or territory of his residence for tax purposes) and date and place of birth (in the case of an individual) of each reportable person, that is an account holder of the account;
- (b) in the case of any entity which is an account holder and which, after application of due diligence procedures prescribed in rule 114H, is identified as having one or more controlling persons that is a reportable person,-
 - (i) the name and address of the entity, taxpayer identification number assigned to the entity by the country or territory of its residence; and
 - (ii) the name, address, date and place of birth of each such controlling person and taxpayer identification number assigned to such controlling person by the country or territory of his residence;

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

- (c) the account number (or functional equivalent in the absence of an account number);
- (d) the account balance or value (including, in the case of a cash value insurance contract or annuity contract, the cash value or surrender value) at the end of relevant calendar year or, if the account was closed during such year, immediately before closure;
- (e) in the case of any custodial account,-
 - (i) the total gross amount of interest, the total gross amount of dividends, and the total gross amount of other income generated with respect to the assets held in the account, in each case paid or credited to the account (or with respect to the account) during the calendar year; and
 - (ii) the total gross proceeds from the sale or redemption of financial assets paid or credited to the account during the calendar year with respect to which the reporting financial institution acted as a custodian, broker, nominee, or otherwise as an agent for the account holder;
- (f) in the case of any depository account, the total gross amount of interest paid or credited to the account during the relevant calendar year;
- (g) in the case of any account other than that referred to in clauses (e) or (f), the total gross amount paid or credited to the account holder with respect to the account during the relevant calendar year with respect to which the reporting financial institution is the obligor or debtor, including the aggregate amount of any redemption payments made to the account holder during the relevant calendar year.

The tax auditor should verify that the above information is appropriately maintained and reported in Form No. 61B. He should verify that all reportable accounts are reported. The amounts reported are aggregated where required and the amounts and values and other

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

details are correctly reported in Form 61B. In case any reportable account has been omitted or there is any error or omission in Form 61B, the same may be reported under clause 42 of the Form No. 3CD. It may be noted that corrections may be filed for Form No. 61B. The auditor should verify if the assessee has filed Form No. 61B for correcting errors or omissions in the form filed originally. In such a case the auditor should give details of both the forms filed. The errors in the original Form 61B which are corrected in the revised Form 61B need not be reported under clause 42 of Form No. 3CD.

It may be noted The statement in Form No. 61B referred to in Rule 114G(7) has to be furnished for every calendar year by the 31st day of May following that year to the Director of Income-tax (Intelligence and Criminal Investigation) or the Joint Director of Income-tax (Intelligence and Criminal Investigation). It is to be furnished through online transmission of electronic data to a server designated for this purpose under the digital signature and in accordance with the data structure specified in this regard by the Principal Director General of Income-tax (Systems). It may be noted that even if pursuant to the due diligence procedures no account is identified as a reportable account, a nil statement has to be furnished by the reporting financial institution.

Every reporting financial institution has to communicate to the Principal Director General of Income-tax (Systems) the name, designation and communication details of the Designated Director and the Principal Officer and obtain a registration number. This registration number is to be quoted in the Form 61B. Form 61B also requires ITDREIN which is a Unique ID issued by the Department which is communicated by the Department after the registration of the reporting entity.

The statement in Form 61B is to be signed, verified and filed by the designated director. If the reporting financial institution is a non-resident, the statement in the Form 61B may be signed, verified and furnished by a person who holds a valid power of attorney from such Designated Director.

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

The tax auditor should verify that Form 61B is duly signed by the designated director and filed.

XIV. Clause 43

43. (a) Whether the assessee or its parent entity or alternate reporting entity is liable to furnish the report as referred to in sub-section (2) of section 286 (Yes/No)

(b) if yes, please furnish the following details:

(i) Whether report has been furnished by the assessee or its parent entity or an alternate reporting entity

(ii) Name of parent entity

(iii) Name of alternate reporting entity (if applicable)

(iv) Date of furnishing of report

Clause 43 has been newly introduced in Form No. 3CD. The Finance Act, 2016 by introducing section 286 in the Act, has introduced provisions relating to the Country by Country Report (CbCR) and Master File pursuant to adoption of OECD's Base Erosion and Profit Shifting (BEPS), Action Plan 13 in India. Broadly, under these provisions, an international group has to furnish CbCR containing information about the whole group comprising of various constituent entities. Such a report is to be filed in India, if the parent entity is resident of India or the international group has appointed a constituent entity which is resident in India to file CbCR on behalf of the whole group.

Section 286 deals with filing of Country by Country Report by 'international group'. Section 286(9) defines various terms used in the section. These include 'accounting year', 'alternate reporting entity', 'constituent entity', 'group', 'consolidated financial statements', 'international group', 'parent entity' 'permanent establishment', 'reporting accounting year', and 'reporting entity' etc.

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

Under section 286(1), every constituent entity resident in India if it is a constituent of an international group and the parent entity of which is not resident in India, has to notify the prescribed income tax authority i.e. the Director General of Income tax (Risk Assessment) in Form No. 3CEAC whether it is the alternate reporting entity of the international group; or the details of the parent entity or the alternate reporting entity, if any, of the international group, and the country or territory of which the said entities are resident.

Section 286(9)(g) defines the term 'international group' to mean any group that includes, (i) two more enterprises which are resident of different countries or territories; or (ii) an enterprise, being a resident of one country or territory, which carries on any business through a permanent establishment in other countries or territories.

Alternate Reporting Entity has been defined in clause (c) of section 286(9) to mean any constituent entity of the international group that has been designated by such group, in the place of the parent entity, to furnish the report of the nature referred to in sub-section (2) in the country or territory in which the said constituent entity is resident on behalf of such group.

Section 286(2) casts an obligation on the parent entity if it is resident in India or the alternate reporting entity if it is resident in India to furnish for every 'reporting accounting year', in respect of the international group of which it is a constituent, a report, to the prescribed authority i.e. the Director General of Income tax (Risk Assessment) in the prescribed form and in the prescribed manner. Rule 10DB has prescribed Form No. 3CEAD to file the said report. The report has to be filed within a period of 12 months from the end of the 'reporting accounting year'. The term 'reporting accounting year' has been defined in clause (j) of section 286(9) as under:

'reporting accounting year' means the accounting year in respect of which the financial and operational results are required to be reflected in the report referred to in sub-sections (2) and (4). The term 'reporting accounting year' has been defined in clause (a) of section 286(9) as under:

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

'accounting year' means

- (i) a previous year, in a case where the parent entity or alternate reporting entity is resident in India; or
- (ii) an annual accounting period, with respect to which the parent entity of the international group prepares its financial statements under any law for the time being in force or the applicable accounting standards of the country or territory of which such entity is resident, in any other case.

The report under section 286(2) is filed by the parent entity which is resident in India or the alternate reporting entity which is resident in India. Considering this, the reporting accounting year for the purposes of the report section 286(2) shall be the previous year as defined under the Act.

Tax audit report is filed for each assessment year. Under Explanation 2 to section 139(1) the due date for filing the return of income in case of an assessee who is required to furnish report under section 92E is 30th November of the assessment year. The due dates in other cases are even before 30th November of the assessment year. The report referred to in section 286(2) is to be filed within a period of 12 months from the end of the reporting accounting year. The report referred to in section 286(2) is filed by the parent entity or the alternate reporting entity both of whom have to be resident in India. In such a case the reporting accounting year would be the previous year. For of previous year ending on 31st March the report under section 286(2) is to be filed within 12 months from the reporting accounting year. By this time, the due date for obtaining the tax audit report and filing the return will have elapsed. Considering this, the requirement of clause 43 should be taken to be visa-vis the obligation that arose for furnishing the report under section 286(2) during the previous year ending on 31st March for which the tax audit is being undertaken. Accordingly, for tax audit for the assessment year 2018-19, the tax auditor should comment upon report section 286(2) that was required to be filed on or before 31 March 2018.

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

Clause 43(a) requires the auditor to state whether the assessee or its parent entity or alternate reporting entity is liable to furnish the report referred to in section 286(2). Thus, the obligation to furnish the report referred to in section 286(2) arises under following situations requiring reply in affirmative to clause 43(a):

- (i) If the assessee itself is the parent entity of the international group and is resident in India, it will have the obligation to furnish the report under section 286(2);
- (ii) If the assessee is resident in India and has been designated as the alternate reporting entity of the international group, it will have obligation to furnish the report under section 286(2)
- (iii) If the assessee is a constituent of the international group with its parent entity resident in India and the group has not designated any other resident constituent entity as the alternate reporting entity, the parent entity will have the obligation to file the report under section 286(2);
- (iv) If the assessee is neither the parent entity nor has it been designated as the alternate reporting entity, but other constituent entity resident India of the international group has been designated as the alternate reporting entity by the group, such other constituent entity resident India will have obligation to file the report under section 286(2).

The tax auditor should verify in the case of the assessee if any of the above four situations exist. The tax auditor should verify if the assessee whose parent is a non-resident has filed Form No. 3CEAC. It will indicate if the assessee or another constituent entity resident in India has been designated as the reporting entity for the international group. The tax auditor may obtain necessary certificate from the assessee in respect of constitution of the international group, entities that are resident in India and not resident in India and entity if appointed as the alternate reporting entity.

If none of the above four situations described above exists, the reply to clause 43(a) will be negative.

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

If the reply to clause 43(a) is in affirmative, following information has to be furnished:

- (i) Whether report has been furnished by the assessee or its parent entity or an alternate reporting entity
- (ii) Name of parent entity
- (iii) Name of alternate reporting entity (if applicable)
- (iv) Date of furnishing of report

If the assessee has filed a report, the same may be verified. If the report has been filed either by the parent of the assessee or another constituent entity of the international group, the tax auditor should ask for a copy of the report and information about the date of its filing. It may be noted that the tax auditor is not required to comment upon correctness or completeness of the report filed under section 286(2).

A reference may be made to section 286(4). Under section 286(4), in certain circumstances a constituent entity resident in India of an international group, although not designated as the alternate reporting entity under section 286(2), has to furnish the report referred to in section 286(2). Accordingly, the report under section 286(4) is also in Form No. 3CEAD. Report under section 286(4) is to be filed within the period as may be prescribed. No time has yet been prescribed for filing this report. A question to be considered is whether the Clause 43 also requires the tax auditor to comment in respect of report under section 286(4).

The heading of Form No. 3CEAD reads as 'Report by a parent entity or an alternate reporting entity or any other constituent entity, resident in India, for the purposes of sub-section (2) or sub-section (4) of section 286 of the Income-tax Act, 1961'. Although, the format of the report under section 286(2) and under section 286(4) is same, these are filed under separate sub-sections and under separate conditions. The form itself refers to both the sections. The 'reporting accounting

Implementation Guide w.r.t. Notification No. 33/2018 dated 20.07.2018 ...

year' may be different for report under section 286(4) and report under section 286(2). As mentioned earlier, time within which the report under section 286(4) has to be furnished has not been prescribed. Hence, reporting requirement under section 286(4) is independent and clause 43 does not require the auditor report on the same.

