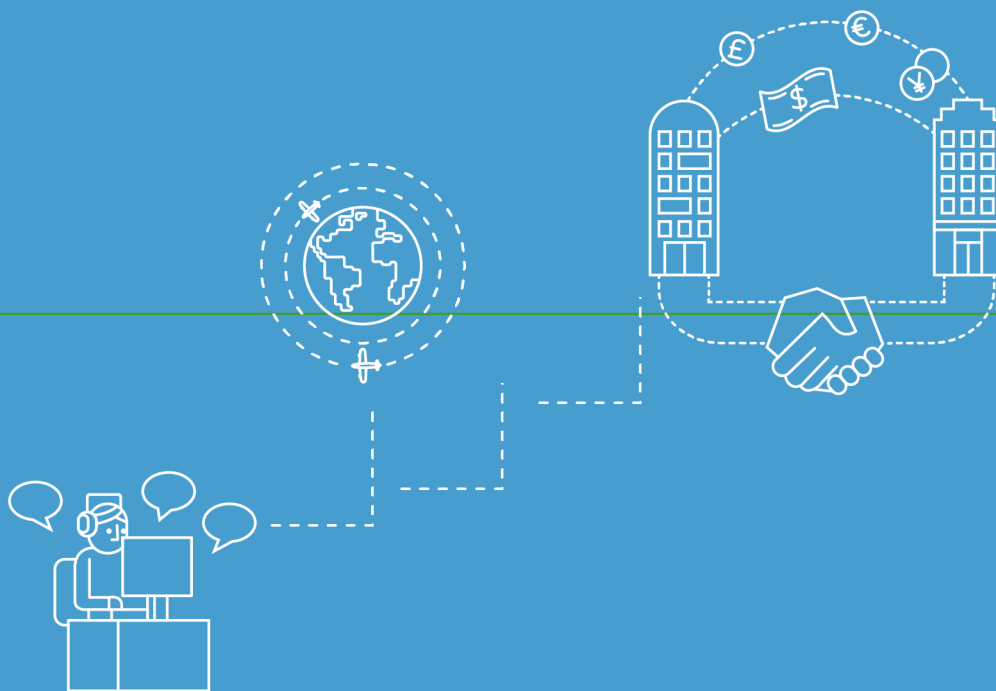


Understanding and addressing non-resident tax issues of corporates and individuals



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DRAFT GUIDING PRINCIPLES FOR DETERMINATION OF 'PLACE OF EFFECTIVE MANAGEMENT' OF A COMPANY

With effect from financial year 2015-16, a foreign company will be treated as resident in India if its place of effective management ('POEM'), in that year, is in India. For determination of POEM, the CBDT has issued draft guidelines on 23 December, 2015 containing a non-exhaustive list of facts and circumstances to be decided on a case-by-case basis for comments from stakeholders and general public.

The gist of the above draft guidelines is as under:

- **For companies engaged in 'active business outside India'** (based on proportion of passive income to total income, location of total assets, location of employees and their residential status, proportion of payroll expenditure on such employees), the POEM is to be decided taking into account following factors, in particular:
 - Place where majority meetings of the board of directors of the company are held.
 - Where Board of directors of the company are standing aside and not exercising their powers of management and such powers are being exercised by either the holding company or any other person (s) resident in India, then the POEM shall be considered to be in India.
- **For other companies i.e. companies other than companies engaged in 'active business outside India'** the POEM is to be decided taking into account following factors, in particular:
 - Place where a company's board regularly meets and makes decisions may be the company's POEM provided, the Board retains and exercises its authority to govern the company; and does, in substance, make the key management and commercial decisions necessary for the conduct of the company's business as a whole.
 - Mere formal holding of board meetings at a place would by itself not be conclusive for determination of POEM being located at that place. If the key decisions by the directors are in fact being taken in a place other than the place where the formal meetings are held then such other place would be relevant for POEM.
 - **Delegation of authority**
 - If a board has de facto delegated the authority to make the key management and commercial decisions for the company to the senior management and does nothing more than routinely ratifying the decisions, the company's POEM will ordinarily be the place where these senior managers make those decisions.
 - Where a board delegates some or all of its authority to one or more committees such as an executive committee consisting of key members of senior management, the location where the members of the executive committee are based and where that committee develops and formulates the key strategies and policies for mere formal approval by the full board will often be considered to be the company's POEM.
 - **Location of Head Office**
 - The location of a company's head office is a very important factor in the determination of the POEM. The following points need to be considered for determining the location of the head office of the company
 - If the company's senior management and their support staff are based in a single location and that location is held out to the public as the company's principal place of business or headquarters then that location is the place where head office is located.
 - If the company is more decentralized (for example where various members of senior management may operate, from time to time, at offices located in the various countries) then the company's head office would be the location where these senior managers, - (i) are primarily or predominantly based; or (ii) normally return to following travel to other locations; or (ii) meet when formulating or deciding key strategies and policies for the company as a whole.
 - Members of the senior management may operate from different locations on a more or less permanent basis and the members may participate in various meetings via telephone or video conferencing rather than by being physically present at meetings in a particular location. In such situation the head office would normally be the location, if any, where the highest level of management (for example, the Managing Director and Financial Director) and their direct support staff are located.

- In situations where the senior management is so decentralized that it is not possible to determine the company's head office with a reasonable degree of certainty, the location of a company's head office would not be of much relevance in determining that company's place of effective management.

- **Use of modern technology in conducting meeting**

Since today it is no longer necessary for the persons taking decision to be physically present at a particular location, physical location of board meeting or executive committee meeting or meeting of senior management may not be where the key decisions are in substance being made. In such cases the place where the directors or the persons taking the decisions or majority of them usually reside may be a relevant factor.

- **Relevant Factors for determining POEM but not conclusive in itself**

- The fact that foreign company is completely owned by an Indian company
- The fact that local management is situated in India
- The existence in India of support functions that are preparatory and auxiliary in character
- The fact that one or some of the Directors of a foreign company reside in India

- **Not relevant factor for determining POEM**

Place where day to day routine operational decisions undertaken by junior and middle management shall not be relevant for the purpose of determination of POEM.

- **Additional factors for determining POEM**

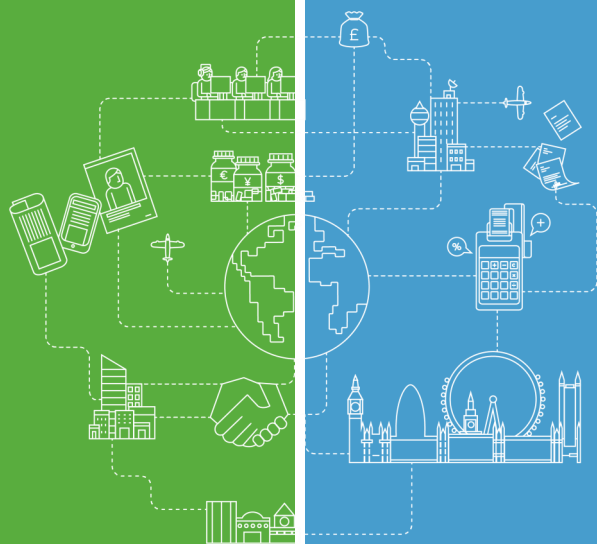
If the above factors do not lead to clear identification of POEM then the following secondary factors can be considered:

- i. Place where main and substantial activity of the company is carried out; or
- ii. Place where the accounting records of the company are kept.

Based on the facts and circumstances if it is determined that the POEM is in India as well as outside India then POEM shall be presumed to be in India if it has been predominantly in India.

The text of Draft Guidance can be accessed through the following link.

<http://www.incometaxindia.gov.in/Documents/POEM-note-for-uploading.pdf>



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This newsflash is general in nature. In this newsflash, we have summarised the draft CBDT guidelines issued on 23 December, 2015 . It may be noted that nothing contained in this newsflash should be regarded as our opinion and facts of each case will need to be analyzed to ascertain applicability or otherwise of the respective circulars and notifications and appropriate professional advice should be sought for applicability of legal provisions based on specific facts. We are not responsible for any liability arising from any statements or errors contained in this newsflash.

24 December 2015

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