

POEM — is now lyrics of every tax professional and corporates having subsidiaries outside India. This concept is introduced in Indian tax legislation to tax in India income which has been earned by foreign corporations managed from India in foreign jurisdiction.

The term POEM stands for - "Place Of Effective Management" and refers to a place where key management and commercial decisions that are necessary for the conduct of business of an entity as a whole, are in substance, made.

The CBDT has now spelt out norms to determine if an entity's POEM lies in India.

Up to 31 March 2015, a company was considered resident in India in any previous year, if it was either an Indian company or the control and management of its affairs was situated **wholly** in India. This allowed companies to avoid paying tax in India by artificially escaping residential status by shifting insignificant or isolated events related with control and management outside India. Now these guidelines follow change in the income tax in the budget, which provided that **a company will be resident in India in any previous year if it is an Indian company or its place of effective management (POEM) is in India in that year.** This will plug a loophole used to avoid paying tax in India.

Industry experts say that draft POEM guidelines provides directional guidance on many controversial issues on the way the concept should be applied. POEM determination will be primarily based on whether or not the company is engaged in 'active business outside India'. This will be determined based on factors such as passive income, total asset base, number of employees and payroll expenses in India and outside.

According to the draft guidelines, a company shall be said to be engaged in "active business outside India" if the passive income is not more than 50% of its total income and,

- less than 50% of its total assets are situated in India; and
- less than 50% of total number of employees are situated in India or are resident in India; and
- the payroll expenses incurred on such employees is less than 50% of its total payroll expenditure ;

The guidelines prescribe calculation of passive income, which shall be aggregate of income from the transactions where both the purchase and sale of goods is from to its associated enterprises and income by way of royalty, dividend, capital gains, interest or rental income.

For the purpose of determining whether the company is engaged in active business outside India the average of the data of the previous year and two years prior to that shall be taken into account. In case the company has been in existence for a shorter period, then data of such period shall be considered. In cases of companies other than those that are engaged in active business outside India, the determination of POEM would be a two stage process, namely:-

- First stage would be identification or ascertaining the person or persons who actually make the key management and commercial decision for conduct of the company's business as a whole.
- Second stage would be determination of place where these decisions are in fact being made.

Head office of a company would be the place where company's senior management and their direct support staff are located. If they are in multiple locations, then the place where they are primarily or predominantly located would be the head office.

The guidelines also take in consideration the developments in digital era that makes physical location irrelevant — cases where decision makers usually reside or additional factors such as place where main and substantial activity or where company accounts records are kept may be taken into account.

The place where management decisions are taken would be more important than the place where such decisions are implemented and 'substance' would be conclusive rather than 'form'.

In case the Assessing officer proposes to hold a company incorporated outside India, on the basis of its POEM, as being resident in India then any such finding shall be given by the Assessing officer after seeking prior approval of the Principal Commissioner or the Commissioner, as the case may be, in this regard. The Principal Commissioner or the Commissioner shall provide an opportunity of being heard to the company before deciding the matter.

Many feel that the guidelines need to be made applicable from 01 April 2016.

When POEM is implemented, it will definitely usher in change in the manner of taxing the income which is earned by foreign corporations managed from India in foreign jurisdiction.