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THE INSTITUTE OF COST ACCOUNTANTS OF INDIA
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To,
Director (Tax Policy & Legislation)-I
Central Board of Direct Taxes,
Room No. 147-D,
North Block,
New Delhi – 110001

Subject: Draft Guiding Principles for Determination of Place of Effective Management (Poem) of a Company Formulated.

Dear Sir,

Institute of Cost Accountants of India is a Statutory body established under an Act of Parliament (viz. Cost and Works Accountants Act,1959), performing a distinct role in maintaining governance system in the country's economy, ensuring transparency, proper disclosure and social security for consumers at large.

We are enclosing herewith our comments and suggestions with justification on **Draft Guiding Principles for Determination of Place of Effective Management (Poem) of a Company Formulated** which may be effective from 1st April 2016.

Kindly consider our suggestions before finalizing the said draft. We will have great pleasure to furnish you any further clarification.

Thanking you,

Yours faithfully,

With warm regards
CMA Ashok Nawal - Central Council Member &
Chairman – Taxation Committee

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Draft Guiding Principles for Determination of Place of Effective Management (Poem) of a Company Formulated.

Clause No	Draft Guidelines as proposed	suggestions / comments	Justification
5	For the purposes of these guidelines, - (a) 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 (i) less than 50% of its total assets are situated in India; and (ii) less than 50% of total number of employees are situated in India or are resident in India; and or (iii) the payroll expenses incurred on such employees is less than 50% of its total payroll expenditure ;	For the purposes of these guidelines, - (a) 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 OR (i) less than 50% of its total assets are situated in India; OR (ii) less than 50% of total number of employees are situated in India or are resident in India; and or (iii) the payroll expenses incurred on such employees is less than 50% of its total payroll expenditure ;	If all the conditions has to be made for the object of changes in the Finance budget will get defeated and therefore it will have restricted coverage since all three conditions have to be made together for scope and coverage. Number of companies will be out of the coverage. Further, a. By the proposed definition in clause 5(a) read with 5(c), even if the income comprises 50% or more of "passive income" from sources within or outside India , if the conditions laid down in sub-clauses (i) through (iii) are not satisfied, then the company would still be having "active business outside India". A situation can be envisaged where the key management decisions in respect of such passive income may be taken by persons resident in India but the total assets/number of employees etc. would be less than 50%. This would lead to the entity having its POEM outside India although it should logically be considered as having its POEM in India. It is, therefore, suggested that the conditions stipulated in sub-clauses (i) through (iii) be deleted altogether because they are really not of much relevance in deciding the POEM in cases where passive income is 50% or more of total income. If the entity does not have active business outside India, based purely on the percentage of passive income, then the proposed clause 8 can be invoked to establish the POEM, irrespective of the number of employees, quantum of assets etc. b. Date on which the balance of total assets will be taken into account be specified as the Balance Sheet date pertaining to the financial year pertaining to which the POEM is being established. In the event that the company follows a financial year different from the financial year as per the Income Tax Act, 1961, then the closing balance of assets as at the last audited Balance Sheet date be considered. Furthermore, in certain jurisdictions (like Brazil), auditing of accounts of companies is not mandatory under law. In such cases, the balance of total assets as at the Balance Sheet date pertaining to the close of the financial year as per local law of the country where the company is incorporated may be considered together with the certificate from a Public Accountant certifying the balance of assets as at that date;
			c. There may be situations where an expatriate employee of a foreign company may be situated in India but may not be resident as per the provisions of the Act. It may, therefore, be clarified that the word "resident" means continuous stay for a pre-defined period, irrespective of whether the said period of stay, or more than one such period of stay, leads to the status of being "resident". Furthermore, it may be clarified whether the reference will be to the maximum number of such employees at any point of time during the year or whether the number as at Balance Sheet date shall be considered; d. Payroll expenses should be clearly defined. For example, expatriate employees may be entitled to a daily allowance towards living costs in the country to which they are sent for the purpose of execution of work. Are these to be included? What about costs of the nature of insurance, non-monetary perquisites (whether in home country or host country) etc.?

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5(d)	"Senior Management" in respect of a company means the person or persons who are generally responsible for developing and formulating key strategies and policies for the company and for ensuring or overseeing the execution and implementation of those strategies on a regular and on-going basis. While designation may vary, these persons may include: (i) Managing Director or Chief Executive Officer; (ii) Financial Director or Chief Financial Officer; (iii) Chief Operating Officer; and (iv) The heads of various divisions or departments (for example, Chief Information or Technology Officer, Director for Sales or Marketing).	*"Key managerial personnel", in relation to a company, means—* *(i) the Chief Executive Officer or the managing director or the manager;* *(ii) the company secretary;* *(iii) the whole-time director;* *(iv) the Chief Financial Officer; and* *(v) such other officer as may be prescribed;*	It is better to synchronize the definitions in all the acts and hence definition as given in the companies Act 2013 should be incorporated.
7	The place of effective management in case of a company engaged in active business outside India shall be presumed to be outside India if the majority meetings of the board of directors of the company are held outside India.	The place of effective management in case of a company engaged in active business outside India shall be presumed to be outside India if the majority of the policy and operational decisions are held outside India and the maximum number of meetings to be held outside India should be as permitted under Companies Act 2013	Holding of meetings have no direct nexus with active business. This clause may be reconsidered.
7.2, 8,9	7.2 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.	The whole of para 7,8 & 9 are simply complicated and subjective. The tests on passive income, Assets and employees are the concrete tests and guidance should be limited to them only.	
	8. In cases of companies other than those that are engaged in active business outside India referred to in para 7 the determination of POEM would be a two stage process , namely:- (i) . 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. (ii) . Second stage would be determination of place where these decisions are in fact being made. 8.1 The place where these management decisions are taken would be more important than the place where such decisions are implemented. For the purpose of determination of POEM it is the substance which would be conclusive rather than the form.		

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	8.2 Some of the guiding principles which may be taken into account for determining the PoEM are as follows: (a) The location where a company's board regularly meets and makes decisions may be the company's place of effective management provided, the Board- (i) retains and exercises its authority to govern the company; and (ii) does, in substance, make the key management and commercial decisions necessary for the conduct of the company's business as a whole. It may be mentioned that 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. As an example this may be the case where the board meetings are held in a location distinct from the place where head office of the company is located or such location is unconnected with the place where the predominant activity of the company is being carried out. If a board has de facto delegated the authority to make the key management and commercial decisions for the company to the senior management or any other person including a shareholder and does nothing more than routinely ratifying the decisions that have been made, the company's place of effective management will ordinarily be the place where these senior managers or the other person make those decisions.		
	(b) A company's board may delegate some or all of its authority to one or more committees such as an executive committee consisting of key members of senior management. In these situations, 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 place of effective management. The delegation of authority may be either de jure (by means of a formal resolution or Shareholder Agreement) or de facto (based upon the actual conduct of the board and the executive committee). (c) The location of a company's head office will be a very important factor in the determination of the company's place of effective management because it often represents the place where key company decisions are made. 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.		

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	• 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. (d) It may be clarified that day to day routine operational decisions undertaken by junior and middle management shall not be relevant for the purpose of determination of POEM.		
	(e) The use of modern technology impacts the place of effective management in many ways. It is no longer necessary for the persons taking decision to be physically present at a particular location. Therefore 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 also be a relevant factor. (f) 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.		

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	9. It needs to be emphasized that the determination of PoEMis to be based on all relevant facts related to the management and control of the company, and is not to be determined on the basis of isolated facts that by itself do not establish effective management, as illustrated by the following examples: i. The fact that a foreign company is completely owned by an Indian company will not be conclusive evidence that the conditions for establishing PoEM in India have been satisfied. ii. The fact that one or some of the Directors of a foreign company reside in India will not be conclusive evidence that the conditions for establishing PoEM in India have been satisfied. iii. The fact of , local management being situated in India in respect of activities carried out by a foreign company in India will not , by itself, be conclusive evidence that the conditions for establishing PoEM have been satisfied. iv. The existence in India of support functions that are preparatory and auxiliary in character will not be conclusive evidence that the conditions for establishing PoEM in India have been satisfied.		

GENERAL COMMENT :

It should be clarified that in the case of a group of companies, the establishment of POEM of any individual member of the group shall be based on the proposed principles as applied for the individual member of the group and should not be determined based on the POEM of the group as a whole.

In the illustrations set out in clause 9, it may be clarified that the mere existence of a PE in India should not by itself be taken to establish the POEM unless the other guiding principles lead to the same conclusion.