



CBDT issues clarification related to guidelines for establishing 'Place of Effective Management' in India

The Finance Act, 2015 introduced the concept of Place of Effective Management (POEM) under the provisions of Section 6(3) of the Income-tax Act, 1961 (the Act). It provides that a company is said to be resident in India in any previous year if it is an Indian company; or its POEM in that year is in India. These provisions have come into effect from Assessment Year 2017-18 onwards. On 24 January 2017, the Central Board of Direct Taxes (CBDT) issued¹ the guiding principles (POEM guidelines) for determination of POEM of a company.

Various stakeholders have raised concerns that as per the guidelines, POEM may be triggered in the cases of certain multinational companies with regional headquarter structure merely on the ground that certain employees having multi-country responsibility or oversight over the operations in other countries of the region are working from India and consequently, their income from operations outside India may be taxed in India.

The guidelines state that the POEM in case of a company engaged in active business outside India shall be presumed to be outside India if the majority Board of Directors (BoD) meetings of the company are held outside India. However, if on the basis of facts and circumstances, it is established that the BoD 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. Merely because

the BOD follows general and objective principles of global policy of the group laid down by the parent entity which may be in the field of payroll functions, accounting, Human Resource (HR) functions, IT infrastructure and network platforms, supply chain functions, routine banking operational procedures, and not being specific to any entity or group of entities per se, would not constitute a case of BoD of companies standing aside.

Recently, the Central Board of Direct Taxes (CBDT) has issued a circular² clarifying that as long as the regional headquarter operates for subsidiaries/group companies in a region within the general and objective principles of global policy of the group laid down by the parent entity in the field of payroll functions, accounting, HR functions, IT infrastructure and network platforms, supply chain functions, routine banking operational procedures, and not being specific to any entity or group of entities per se; it would not constitute a case of BOD of companies standing aside and such activities of regional headquarter in India alone will not be a basis for establishment of POEM for such subsidiaries/group companies.

The CBDT has also clarified that the provisions of General Anti-Avoidance Rule (GAAR)³ may get triggered in such cases where the above clarification is found to be used for abusive/aggressive tax planning.

¹ Circular No 6 of 2017, dated 24 January 2017

² CBDT Circular No. 25 of 2017, dated 23 October 2017

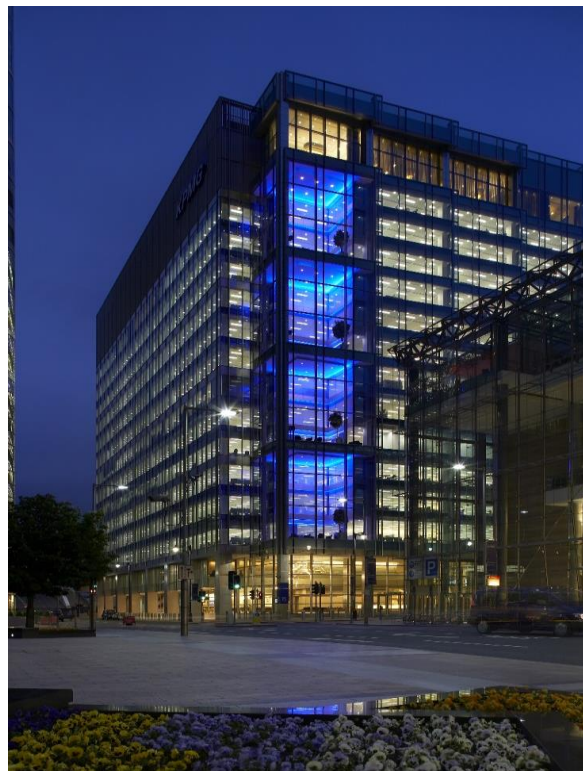
³ Provisions of Chapter X-A of the Act

Our comments

After the final POEM guidelines were released, there were concerns that POEM may be triggered in cases of certain multinational companies with regional headquarter structure merely on the ground that certain employees having multi-country responsibility or oversight over the operations in other countries of the region are working from India. Based on various representation, CBDT has now clarified that the specified activities of regional headquarter in India alone will not be a basis for the establishment of POEM in India. This is a welcome clarification. It will help multinational companies having the regional headquarter for specified activities in India.

The circular also states that the provisions of GAAR may get triggered where such clarification is found to be used for abusive/aggressive tax planning.

The Finance Act, 2016 introduced special provisions under Chapter XII-BC consisting of Section 115JH in the Act with effect from 1 April 2017. Section 115JH of the Act, provides that the central government may notify exception, modification, and adaptation subject to which, specified provisions⁴ of the Act shall apply in a case where a foreign company is said to be resident in India due to its POEM being in India for the first time, and the said company has never been resident in India before. Further, these transitional provisions would also cover any subsequent previous year up to the date of determination of POEM in an assessment proceeding. On 15 June 2017, CBDT issued draft notification⁵ with respect to such exception, modification, and adaptation and invited suggestions from various stakeholders. The final notification is awaited which may provide further clarity on the applicability of POEM related provisions.



⁴ Specified provisions relating to computation of total income, treatment of unabsorbed depreciation, set off or carry forward and set off of losses, collection, and recovery and special provisions relating to avoidance of tax

⁵ Draft notification, dated 15 June 2015

www.kpmg.com/in

Ahmedabad

Commerce House V, 9th Floor,
902 & 903, Near Vodafone House,
Corporate Road,
Pralhad Nagar,
Ahmedabad – 380 051
Tel: +91 79 4040 2200
Fax: +91 79 4040 2244

Bengaluru

Maruthi Info-Tech Centre
11-12/1, Inner Ring Road
Koramangala,
Bengaluru – 560 071
Tel: +91 80 3980 6000
Fax: +91 80 3980 6999

Chandigarh

SCO 22-23 (1st Floor)
Sector 8C, Madhya Marg
Chandigarh – 160 009
Tel: +91 172 393 5777/781
Fax: +91 172 393 5780

Chennai

KRM Tower, Ground Floor,
No 1, Harrington Road
Chetpet, Chennai – 600 031
Tel: +91 44 3914 5000
Fax: +91 44 3914 5999

Gurugram

Building No.10, 8th Floor
DLF Cyber City, Phase II
Gurugram, Haryana – 122 002
Tel: +91 124 307 4000
Fax: +91 124 254 9101

Hyderabad

Salarpuria Knowledge City,
ORWELL, 6th Floor, Unit 3, Phase
III, Sy No. 83/1, Plot No 2,
Serilingampally Mandal, Raidurg
Ranga Reddy District,
Hyderabad, Telangana – 500081
Tel: +91 40 6111 6000
Fax: +91 40 6111 6799

Jaipur

Regus Radiant Centres Pvt Ltd.,
Level 6, Jaipur Centre Mall,
B2 By pass Tonk Road
Jaipur, Rajasthan, 302018.
Tel: +91 141 - 7103224

Kochi

Syama Business Center
3rd Floor, NH By Pass Road,
Vytilla, Kochi – 682019
Tel: +91 484 302 7000
Fax: +91 484 302 7001

Kolkata

Unit No. 603 – 604,
6th Floor, Tower – 1,
Godrej Waterside,
Sector – V, Salt Lake,
Kolkata – 700 091
Tel: +91 33 4403 4000
Fax: +91 33 4403 4199

Mumbai

Lodha Excelus, Apollo Mills
N. M. Joshi Marg
Mahalaxmi, Mumbai – 400 011
Tel: +91 22 3989 6000
Fax: +91 22 3983 6000

Noida

Unit No. 501, 5th Floor,
Advant Navis Business Park
Tower-B, Plot# 7, Sector 142,
Expressway Noida, Gautam Budh Nagar,
Noida – 201305
Tel: +91 0120 386 8000
Fax: +91 0120 386 8999

Pune

9th floor, Business Plaza,
Westin Hotel Campus, 36/3-B,
Koregaon Park Annex, Mundhwa Road,
Ghorpadi, Pune – 411001
Tel: +91 20 6747 7000
Fax: +91 20 6747 7100

Vadodara

iPlex India Private Limited,
1st floor office space, No. 1004,
Vadodara Hyper, Dr. V S Marg
Alkapuri, Vadodara – 390 007
Tel: +91 0265 235 1085/232 2607/232 2672

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