

Enabling provision for implementation of various provisions of the Act in case of a foreign company held to be resident in India.

The provisions of section 6 of the Act provide for conditions in which residence in India is determined in case of different category of persons. Section 6(3) deals with conditions to be satisfied for a company to be treated as resident in India in any previous year. Prior to amendment of section 6(3) by the Finance Act 2015, a company was said to be resident in India in any previous year if it was an Indian company or during that year the control and management of its affairs was situated wholly in India. The Finance Act, 2015 amended the above provision so as to provide that a company would be resident in India in any previous year if it is an Indian company or its Place of Effective Management (POEM) in that year is in India. The POEM was defined to mean a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are in substance made.

In the context of implementation of POEM based residence rule, certain issues, relating to the applicability of current provisions of the Act to a company which is incorporated outside India and has not earlier been assessed to tax in India, have arisen. In particular, the issues relate to applicability of specific provisions of the Act relating to Advance tax payment, applicability of TDS provisions, computation of total income, set off of losses and manner of application of transfer pricing regime. These provisions have compliance requirements which would not have been undertaken by the company at relevant time due to absence of any such requirement under tax laws of country of incorporation of such company. Similarly, issues of computation of depreciation also arise when in earlier years it has not been subject to computation under the Act.

Problems highlighted also arise due to the fact that a company may be claiming to be a foreign company not resident in India but in the course of assessment, it is held to be resident based on POEM being in fact in India. This determination would be well after closure of the previous year and it may not be possible for company to undertake many of procedural requirements. Representations have also been made by stakeholders that the implementation of POEM be deferred by a year, by which time clarity regarding guidelines and applicability of other provisions of the Act would be in place.

In order to provide clarity in respect of implementation of POEM based rule of residence and also to address concerns of the stakeholders, it is proposed to: -

- (a) defer the applicability of POEM based residence test by one year and the determination of residence based on POEM shall be applicable from 01/04/17.
- (b) provide a transition mechanism for a company which is incorporated outside India and has not earlier been assessed to tax in India. The Central Government is proposed to be empowered to notify exception, modification and adaptation subject to which, the provisions of the Act relating to computation of income, treatment of unabsorbed depreciation, setoff or carry forward and setoff of losses, special provision relating to avoidance of tax and the collection and recovery of taxes 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.
- (c) provide that these transition provisions would also cover any subsequent previous year upto the date of determination of POEM in an assessment proceedings. However, once the transition is complete, then normal provision of the Act would apply.
- (d) provide that in the notification, certain conditions including procedural conditions subject to which these adaptations shall apply can be provided for and in case of failure to comply with the conditions, the benefit of such notification would not be available to the foreign company.
- (e) provide that every notification issued in exercise of this power by the Central Government shall be laid before each house of the Parliament.

The amendments will take effect from 1st April, 2017 and shall apply from assessment year 2017-18 and subsequent assessment years.