



COVID-19 AND ITS IMPLICATIONS ON POEM

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ABSTRACT

This research project explores the complexities surrounding the determination of a company's POEM in the evolving digital era, with a particular focus on the challenges introduced by remote work and global mobility, especially in the aftermath of COVID-19. The project examines the existing regulatory frameworks provided by the OECD and Indian tax laws, their applicability in the context of virtual work environments, and the emerging issues that call for updates in international tax policies. Through this study, the project aims to highlight the gaps in current regulations and suggest potential approaches to address these challenges in the modern business landscape.

Keywords: COVID-19, OECD, POEM.

INTRODUCTION

The COVID-19 pandemic impacted global business operations, introducing unprecedented challenges to the frameworks used to determine the tax residence of multinational corporations. Central to this issue is the Place of Effective Management, hereinafter referred to as the POEM, which identifies the jurisdiction where key management and commercial decisions are made. This principle plays a critical role in tax law, as it determines a company's tax obligations on its worldwide income based on its deemed residency.

Pandemic-induced travel restrictions and the widespread adoption of remote work have disrupted conventional business practices, leading to situations where senior executives and board members make critical decisions from locations other than their usual jurisdictions. This shift raised significant concerns about the potential reclassification of a company's POEM,

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particularly for those with executives temporarily based in different countries, thus subjecting these companies to unexpected tax implications.

While the “Organisation for Economic Co-operation and Development”, hereinafter referred to as the OECD, issued guidance suggesting that temporary changes in management location due to the pandemic should not alter a company’s tax residence, the practical application of the POEM principle remains ambiguous. The lack of precise guidelines on how to determine the POEM in today’s increasingly digital and remote work environment presents significant challenges for companies and tax authorities alike.

RESEARCH OBJECTIVES

1. To study the regulatory framework provided by the OECD and the Indian Tax laws regarding the concept of POEM.
2. To analyse how the shift to a digital landscape affects the determination of a company’s POEM.
3. To identify whether the shift to remote work and travel restrictions during the COVID-19 pandemic had any impact on the determination of a company’s POEM.

RESEARCH METHODOLOGY

This research will employ analytical and doctrinal methods of research. Primary sources such as International Conventions and Indian Statutes and Circulars, along with secondary sources such as books and articles, will be used for this research.

REVIEW OF LITERATURE

OECD’s Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework Conditions (2001): This document argues that the POEM is a crucial but complex concept in international tax law. The “OECD Model Tax Convention” describes POEM. However, the precise definition is elusive, leading to reliance on various interpretations. It also suggests that alternatives such as considering the place of incorporation or where a company has its strongest economic ties might help, though these approaches have their own limitations. The author(s) argue that the solutions could involve using a combination of factors or sequential tests to pinpoint POEM, but these methods still struggle to fully address issues like double taxation that arise from conflicting residency rules.

Direct Taxation and E-Commerce: The author, in his journal article, argues that the POEM faces significant challenges in the context of e-commerce due to its inherently mobile nature. Traditional concepts such as Permanent Establishment (PE), residence, and source of income are applied to e-commerce, but can be uncertain when dealing with digital transactions. The rise of e-commerce complicates traditional tests like the “place of incorporation” and “place of effective management,” rendering them less effective. The author highlights that e-commerce creates practical problems in verifying identity and transactions. While the OECD is examining these issues, its current solutions do not suggest significant changes to the core principles of international taxation.

Impact of COVID-19 on Residential Status of Individuals, Employees Stranded in India and Foreign Companies’ PE: The article explores the implications of the COVID-19 pandemic on the POEM for foreign companies, particularly when key management personnel are stranded in India. It highlights a significant concern: if senior management is physically present in India and conducting business activities or board meetings from there, it may inadvertently lead to the company being deemed a resident of India under the POEM rules for the fiscal year 2020-21.

Bigger Consequences of Unpredictable Prolonged Stays under International Taxation: This article examines the tax complications arising from COVID-19 due to extended stays in foreign countries. It highlights that the pandemic’s travel restrictions have caused many individuals and companies to face unexpected tax implications. The article also discusses the risk of creating a PE if employees work from home or other locations outside their usual country. The OECD advises that temporary changes due to the pandemic should not result in a PE. The authors call for more coordinated international efforts and clearer guidelines to manage these tax issues effectively.

THE CONCEPT OF POEM

Companies are recognised as separate legal entities which are different from the ones that create them, hold shares in them, or are members in them. In order to tax these entities, there was a need for a specific regulation that could help in determining the residence of the company, since they are mere artificial legal personalities which do not have a physical presence. Thus, the residence of such an artificial entity is also required to be decided by an artificial residence

which conveys the adequate existence of such a company or a corporation in that particular place.¹

OECD on POEM: The OECD provides a model for the international tax system to determine the residence of a company or a corporation through a “tie-breaker rule” in “Article 4(3)”² which talks about POEM. Paragraph 24 of the Commentary on Article 4 says that:

“The place of effective management is the place where the key management and commercial decisions that are necessary for the conduct of the enterprise's business are, in substance, made. The place of effective management will ordinarily be where the most senior person or group of persons (for example a board of directors) makes its decisions, the place where the actions to be taken by the enterprise as a whole are determined; however, no definitive rule can be given and all relevant facts and circumstances must be examined to determine the place of effective management. An enterprise may have more than one place of management, but it can only have one place of effective management at any one time.”³

Even under most DTAA's, POEM is used as a “tie-breaker” test to determine the residence of a company.⁴

The term “place of effective management” isn't explicitly defined in “Article 4”⁵ of the “OECD Model Tax Convention”. However, some clarification on what this term means is provided in the Commentary on Article 4, which was updated in 2000 with a new paragraph 24.

“24. ... The place of effective management is the place where key management and commercial decisions that are necessary for the conduct of the enterprise's business are, in substance, made. The place of effective management will ordinarily be where the most senior person or group of persons (for example a board of directors) makes its decisions, the place where the actions to be taken by the enterprise as a whole are determined; however, no definitive rule can be given and all relevant facts and circumstances must be examined to determine the place of

¹ BA Van Der Merwe, The Phrase Place of Effective Management Effectively Explained, 18 S. AFR. MERCANTILE L.J. 121, 121-122 (2006).

² Article 4(3), OECD (2017), Model Tax Convention on Income and on Capital: Condensed Version 2017, OECD Publishing, Paris, https://doi.org/10.1787/mtc_cond-2017-en (Accessed on August 26, 2024).

³ 24 OECD, Commentary on the Model Tax Convention on Income and on Capital, Model Tax Convention on Income and on Capital: Condensed Version 2017, OECD Publishing, Paris, https://doi.org/10.1787/mtc_cond-2017-en (Accessed on August 26, 2024).

⁴ KANGA, JAMSHEDJI B. AND NANI A. PALKHIVALA, THE LAW AND PRACTICE OF INCOME TAX, 11th Edn., LexisNexis, 2020.

⁵ MODEL TAX CONVENTION, supra note 2.

effective management. An enterprise may have more than one place of management, but it can have only one place of effective management at any one time.”⁶

The OECD Discussion Draft further elaborates on the making of “key management and commercial decisions” as “where the actions to be taken by the entity as a whole are, in fact, determined”.⁷ The Draft clearly states that if the formal approval or finalisation of key decisions occurs in a different jurisdiction from where the decisions were actually made, the “place where the decisions were originally made will be considered the POEM.”⁸ However, this Draft proposal does not have any binding authority as it is only in its conceptual stage. Yet, this could have its relevance in understanding the fact that the OECD interprets the phrase to depend on where the superior management decisions are made. This interpretation was developed when companies typically had a clear hierarchy, making it easier to pinpoint where management was located at any given time.⁹

India on POEM: Before the “Finance Act of 2015”¹⁰ A company could be called a resident of India if it was either an Indian company or if its control and management were entirely situated in India during the relevant year. This Act amended “Section 6 of the Income Tax Act, 1961”¹¹, introducing the concept of POEM as a determinant for a company’s residency.¹² This Section provides the mechanism for the determination of residency of different legal entities, such as an individual”¹³ “a Hindu undivided family”¹⁴, “a company”¹⁵, etc.,

Now, Section 6(3) of the IT Act deals with the residential status of a company and reads as follows:

“(3) A company is said to be a resident in India in any previous year, if —

(i) it is an Indian company; or

⁶ COMMENTARY, *supra* note 3.

⁷ OECD Discussion Draft Place of Effective Management Concept: Suggestions for Changes to the OECD Model Tax Convention (27 May 2003).

⁸ *Id.* at 2-5.

⁹ MERWE, *supra* note 1, at 124.

¹⁰ The Finance Act, 2015, No. 20, Acts of Parliament, 2015 (India).

¹¹ The Income Tax Act, 1961, § 6, No. 43, Acts of Parliament, 1961 (India).

¹² 4, Central Board of Direct Taxes, Explanatory notes to the provisions of Finance Act, 2016, Circular No. 03 of 2017, MANU/DTCR/0007/2017 (Issued on 20th January 2017).

¹³ The Income Tax Act, 1961, § 6 (1), No. 43, Acts of Parliament, 1961 (India).

¹⁴ The Income Tax Act, 1961, § 6 (2), No. 43, Acts of Parliament, 1961 (India).

¹⁵ The Income Tax Act, 1961, § 6 (3), No. 43, Acts of Parliament, 1961 (India).

(ii) its place of effective management, in that year, is in India.

Explanation — For this clause, “place of effective management” means 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.”¹⁶

The Central Board of Direct Taxes (CBDT) issued a Circular on POEM, which provides “guiding principles in the determination of POEM of a Company”¹⁷ which can be categorised under two tests:

ABOI Test: A key factor in determining the POEM is whether the company has any “Active Business Outside India” (ABOI). For a foreign company engaged in ABOI, its POEM is generally presumed to be outside India if the majority of the Board of Directors’ meetings take place outside the country. However, if the actual decision-making authority resides with an Indian parent company or any other person resident in India, the POEM would be considered to be in India. There are again four tests to determine whether a company has ABOI based on its passive income, assets, employees and payroll. ¹⁸

Two-fold POEM Test: Where a company does not have any ABOI, the determination of POEM shall be made under a two-stage process as follows:

“(1) First stage would be identification or ascertaining the person or persons who actually make the key management and commercial decisions for the conduct of the company’s business as a whole.

(2) Second stage would be the determination of the place where these decisions are, in fact, being made.”¹⁹

The Circular emphasises that the location where management decisions are made is more significant than where those decisions are implemented. In determining POEM, substance is considered more important than the form.²⁰

¹⁶ The Income Tax Act, 1961, § 6 (3), No. 43, Acts of Parliament, 1961 (India).

¹⁷ Central Board of Direct Taxes, Guiding Principles for determination of Place of Effective Management (POEM) of a Company, Circular No. 6 of 2017, F. No. 142/11/2015-TPL (Issued on 24th January 2017).

¹⁸ CBDT GUIDING PRINCIPLES, *supra* note 17, at ¶ 5.

¹⁹ *Id.* at P 8.

²⁰ *Id.* at P 8.1.

The determination of POEM is based on the specific facts and circumstances of each case. While an entity may have multiple places of management, it can have only one POEM at any given time. Since residence must be determined annually, the POEM must also be assessed every year. The primary factor in determining the POEM is whether the company is involved in ABOI.²¹

However, the implementation of this POEM-based residency rule raised concerns, particularly for companies incorporated outside India that had not previously been assessed for tax in India. Issues arise when a company claims non-residency but is later determined to be resident due to its POEM being in India, often after the financial year has ended, making it difficult to comply with procedural requirements. Due to these concerns and stakeholder representations, amendments were made to defer the applicability of the POEM-based residency test by one year, making it effective from 1 April 2017. Additionally, a new Chapter XII-BC, containing “Section 115JH”²², was introduced to provide further clarity on implementing the rule.²³

POEM IN THE DIGITAL ERA

The rule of POEM faces challenges in the context of digitalisation due to the inherently mobile nature of the digital world.²⁴ Traditionally, POEM was based on where key management decisions were made, but with tools like videoconferencing, these decisions can now happen across multiple locations simultaneously, making it hard to locate a single POEM. For example, if senior managers are spread out across different countries and make decisions via online meetings, it’s unclear which country should be considered the POEM. Similarly, if a company’s board meets in different countries throughout the year, the POEM might seem to move around, leading to complications in determining tax residency.

The incorporation of a company is often a formal process that establishes a connection to one country²⁵, but digitalisation complicates this, making traditional tests like that of the POEM more artificial.²⁶ Companies like Google use complex structures, such as the “Double Irish

²¹ Id. at ¶ 6.

²² The Income Tax Act, 1961, § 115JH, No. 43, Acts of Parliament, 1961 (India).

²³ CBDT EXPLANATORY NOTES, supra note 11, at ¶ 4.

²⁴ Subhajit Basu, International Direct Taxation and E-Commerce: A Catalyst for Reform?, 10 NUJS L. REV. 19 (2017).

²⁵ Subhajit Basu, Direct Taxation and E-Commerce: Possibility and Desirability in digital economy innovations and impacts on society 27, 110 (2012).

²⁶ Dale Pinto, A New Three-Tier Proposal for Determining Corporate Residency Based Principally on Individual Residence, 11 ASIA-PACIFIC TAX BULLETIN 14, 15 (2005).

Dutch Sandwich”,²⁷ to reduce tax liability by operating in low-tax jurisdictions like Bermuda.²⁸ This demonstrates how e-commerce can exploit traditional tax rules and highlights the need for updates in international tax policy.²⁹

Because of these changes in how companies are managed and the role of technology, the location of effective management can be easily chosen or manipulated. Even if we consider key management and decision-making more broadly, technology still makes it challenging to tie effective management to a single, consistent location, which can result in companies having multiple or unclear tax residences, or even no clear residence at all.³⁰

Some cases show that when it’s impossible to determine a clear POEM, countries might rely on where the top manager lives. However, this approach doesn’t always work, especially when key managers are in different countries. As businesses continue to operate globally, these issues are likely to increase. Alternative methods for determining a company’s tax residency could include using the “place of incorporation”, “the location of directors or shareholders”, or “the country with the strongest economic ties”. However, each of these options has its drawbacks, such as the ease of changing the place of incorporation or the difficulty in determining economic ties. This could involve focusing on the most important factors or giving different weights to various factors. Like the approach for individuals, a set of tests could be used in a specific order to determine residency. If one test doesn’t provide a clear answer, the next one will be applied. A mix of the above approaches could be used to create a more amicable solution.³¹

In February 2001, the OECD government representatives reached several important conclusions and recommendations. These conclusions, from the OECD’s “Committee on Fiscal Affairs and its advisory groups, focused on taxation in the international arena and the consumption and administration of the same. The point of relevance with these conclusions

²⁷ Edward Kleinbard, *Stateless Income’s Challenge to Tax Policy* 1441 (USC Gould School of Law, Centre in Law, Economics and Organisation Research Paper Series, Paper no. C12-14, 2011).

²⁸ *Id.*

²⁹ BASU, *supra* note 25, at 121.

³⁰ MERWE, *supra* note 1, at 124.

³¹ OECD (2001), *TAXATION AND ELECTRONIC COMMERCE: IMPLEMENTING OTTAWA TAXATION FRAMEWORK CONDITIONS*, 149-157 OECD Publishing, Paris, <https://doi.org/10.1787/9789264189799-en> (Accessed on August 26, 2024).

here is the fact that the Committee acknowledged that further work is needed, particularly on refining the POEM concept used to determine tax residence.³²

PANDEMIC AND THE POEM

With the surge of COVID-19, there arose a difficulty in determining the POEM of a company, as an Indian resident taking the key management and commercial decisions may get stuck in a foreign country, or a foreign resident may get stuck in India. In that case, a dual residence situation will come into existence.³³ Hence, it became necessary for the law concerning POEM to evolve to keep pace with the rapid changes brought about by digital transactions and a virtual mode of operation that spiked as a result of the pandemic. Tax treaties and OECD guidelines do not provide clear answers to these questions.

Clarifications stating that the “temporary dislocation of Directors and/or Chief Executive Officers due to COVID-19 restrictions or government directives should not alter the residential status of foreign companies, particularly if tie-breaker rules are applied” were released by the OECD Secretariat.³⁴

In response to the pandemic, the CBDT also issued circulars such as the “Circular No.11 of 2020”³⁵ to provide relief to individuals forced to stay in India due to travel restrictions. The circulars aimed to ensure that such forced stays do not affect the tax residency status of individuals, which could indirectly influence the POEM of companies.³⁶ While the CBDT offered relaxation on residential rules for individuals forced to remain in India due to COVID-19,³⁷ no such relief is currently available for stranded employees who might create a permanent establishment or POEM.³⁸

³² OECD Progresses towards Achieving an International Consensus on the Tax Treatment of E-commerce, Annex 1: Emerging conclusions and recommendations from the OECD’s Committee on Fiscal Affairs and publication of reports, PAC/COM/NEWS(2001)15.

³³ Surabhi Bansal & Luv Gupta, Bigger consequences of unpredictable prolonged stays under international taxation- Covid 19 117 taxmann.com 51, 1, 2 (2020).

³⁴ Paridhi Jain, Residential Status of a Company under the Income Tax Act, 1961, SCC OnLine Blog OpEd 182. 8 (2021).

³⁵ Central Board of Direct Taxes, Clarification in respect of residency under section 6 of The Income Tax Act 1961, Circular No. 11/ 2020, F. No. 370142/18/2020- TPL (Issued on May 8, 2020).

³⁶ R. Subhashree, Immunizing residency and PE from Covid-19, 116 taxmann.com 699. 1, 1(2020).

³⁷ CBDT CLARIFICATION, supra note 35.

³⁸ T.C.A. Ramanujam & T.C.A. Sangeetha, Covid and Direct Taxes, 430 ITR (Jrn) 52. 1, 5 (2021).

It is to be understood from this that POEM should not be assessed based solely on a temporary snapshot of management activities in India. Instead, the determination should consider the overall operational context, including the normal *modus operandi* of senior management, the active business conducted outside India, and the legislative intent behind the rules.³⁹

For treaties based on the pre-2017 OECD Model, the place of effective management remains the primary criterion for determining residency. This criterion is used to ascertain where the key management and commercial decisions necessary for the company's business are made. Even during exceptional periods like the COVID-19 crisis, the focus remains on the usual and ordinary place of effective management, rather than the temporary changes caused by the pandemic.⁴⁰

The OECD has issued guidance stating that temporary relocations or work-from-home arrangements shouldn't affect a company's POEM. While some countries might take a different approach, most, including India, are expected to introduce domestic rules to prevent POEM from being established under such unusual circumstances. However, as remote work and virtual offices become the new normal, companies will need to carefully consider the long-term impact of POEM, as these arrangements are likely to extend beyond the temporary period outlined by the OECD for COVID-related situations.⁴¹

However, both the OECD and the Indian Tax laws stay silent on how the POEM of a company is to be determined in a world where virtual work has become the norm across the globe as a result of the pandemic. While the current regulations address temporary dislocations, they do not provide a clear answer for situations where key management decisions are made virtually across multiple locations on a more permanent basis. Thus, there is still a long way to go in addressing these grey areas surrounding the determination of a company's POEM in the context of the modern, digitally-driven work environment.

³⁹ Amit Sharma & Astha Jain, Impact of COVID-19 on Residential Status of Individuals, Employees stranded in India and Foreign Companies' PE 129 *taxmann.com* 101. 6 (2021).

⁴⁰ ¶ 20, OECD (2020), OECD Secretariat analysis of tax treaties and the impact of the COVID-19 crisis, OECD Policy Responses to Coronavirus (COVID-19), OECD Publishing, Paris, <https://doi.org/10.1787/947dcb01-en> (Accessed on August 26, 2024).

⁴¹ Nitin Narang & Adarsh Rathi, Tailoring Transfer Pricing with COVID-19 Adjustments 116 *taxmann.com* 291. 1, 2 (2020).

Further, recent international tax reforms under the “Inclusive Framework’s Base Erosion and Profit Shifting (BEPS) 2.0 reforms”⁴² represent a gradual shift away from strict residence-based taxation towards market-based allocation of taxing rights. Although Pillar One⁴³ and Pillar Two⁴⁴ do not directly modify the POEM concept, they reduce the centrality of corporate residence as the sole determinant of taxing rights. This policy direction suggests that disputes relating to POEM may diminish in significance for large multinational enterprises in the future, even though it continues to remain relevant under domestic tax laws and bilateral tax treaties.

CONCLUSION

Though COVID-19 did not cause digitalisation, it sure has accelerated the same. As a result, the determination of a company’s POEM has become increasingly difficult, particularly with the widespread adoption of remote work and global mobility. The current frameworks provided by the OECD and Indian tax laws, while foundational, are inadequate for addressing the challenges posed by virtual work environments and the fluidity of key management decisions across multiple jurisdictions.

To address these challenges, it is crucial to update international tax policies to reflect the realities of modern business operations and adapt to the new normal. This could involve creating more detailed guidelines for determining POEM in situations where management decisions are made virtually, potentially by giving greater weight to factors such as where the majority of key management resides or where the most significant economic activities occur. Additionally, the introduction of a more flexible, multi-factor approach to POEM determination (similar to the residency tests for individuals) could provide a clearer and more consistent framework for companies.

⁴² OECD (2021), OECD/G20 Inclusive Framework, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf> (Accessed on December 26, 2025).

⁴³ OECD,(2020), Tax Challenges Arising from Digitalisation of the Economy – Report on Pillar One and Pillar Two, <https://www.oecd.org/tax/beps/tax-challenges-arising-from-digitalisation-report-on-pillar-one-and-pillar-two-blueprint.pdf> (Accessed on December 26, 2025).

⁴⁴ Ibid.

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