

# **TWO DAY VIRTUAL CPE MEETING**

## **INTERNATIONAL TAXATION**

22<sup>nd</sup> & 23<sup>rd</sup> January 2021

**HYDERABAD BRANCH OF SIRC OF ICAI**

Place of Effective Management

**POEM**

**INDIA Perspective**

CA P.V.S.S PRASAD  
pvsatya.prasad@gmail.com



# RESIDENTIAL STATUS OF COMPANY

## Earlier definition of residential status of company

- A company is said to be resident in India if:
  - it is an Indian company; or
  - during that year, the control and management of its affairs is situated wholly in India

## **Amended definition of residential status of company**

(section 6(3) – applicable from 1 April 2017 i.e. from AY 2017-18)

- A company is said to be resident in India if:
  - it is an Indian company; or
  - its place of effective management in that year is in India
- Place of effective management means 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 – Explanation to section 6(3) of Income-tax Act

# CONTROL & MANAGEMENT

Erin Estate, Galah, Ceylon  
(34 ITR 1) (SC)

Control and management of its affairs means the de facto control and not the de jure and refers to controlling and directive power often described as "head and brain"

Subbayya Chettaiar (HUF)  
(19 ITR 168) (SC)

Control and management signifies the controlling and directive power, the head and brain and "situated" implies the functioning of such power at a particular place with some degree of permanence

Nandlal Gandlal  
(40 ITR 1) (SC)

The expression "control and management" signifies controlling and directive power, "the head and brain" as it is sometimes called. Furthermore, the expression "control and management" means de facto control and management and not merely the right or power to control and manage

Narottam and Pereira Ltd vs.  
CIT 23 ITR 454 (Bom- HC)

The real test to be applied is, where is the controlling and directing power, or rather, where does the controlling and directing power function or to put it in a different language there is always a seat of power or the head and brain, and what has got to be ascertained is, where is this seat of power, or the head and brain

Saraswati Holding  
Corporation Ltd v. DDIT 111  
TTJ 334 (2007) (ITAT- Del)

Control and management of affairs refers to head and brain, which directs the affairs of policy, finance, disposal of profits and such other vital things qua the general and corporate affairs; It does not refer to control and management of the day-to-day affairs of the business; "PoEM not in India since the Board Resolutions for investment decisions were passed from Mauritius / USA"



## Radha Rani Holdings (P) Ltd 110 TTJ 920 (2007)(ITAT Del)

### Facts

- The assessee-company incorporated under the Laws of Republic of Singapore filed its return of income in the status of a non-resident company.
- The Assessing Officer noticed that the paid up capital of the company consisted of 100 shares; out of which one 'G', who was a resident of India, was holding 99 shares and the other director 'J', who was a resident of Singapore, was holding only one share.
- There was no employee of the assessee company in Singapore and the Company was being operated from New Delhi
- Therefore, as per the AO the Company was being controlled and managed from India only and its control and management was wholly in India.

### Held

Control and Management not in India since:

- Board meetings are held in Singapore and never in India: Since the BoDs, subject to the overall supervision of shareholders, actually controls and manages the affairs of a company effectively as against the day-to-day operation of the company, the situs of the BoDs of the company should determine the 'place of control and management of the company'
- What is relevant is where the BoDs meets for the purpose of determining the key issues relating to the Company. One of the director based in India not relevant as other member of the Board (who were also the Chairman of Board) were based outside India
- Mere operation of bank account does not determine management / control as it powers conferred by BoD
- A board meeting may be by telephonic conversations or video conferencing or circular resolution and not relevant unless an adverse inference is drawn
- Holding of one of the BoD meeting in India is also not relevant if generally such meetings happen outside India
- Although the director based in India held 99% shareholding, all the directors enjoy equal powers irrespective of their shareholding

# WHAT IS POEM & WHAT ARE THE GUIDELINES



## CONCEPT OF POEM

Understanding the concept of POEM



## GUIDELINES ON POEM

Add your words here, According to your need to draw the text box size



# CONCEPT OF POEM



# CONCEPT OF POEM – KEY TERMS

Key terms	Meaning
<b>Effective</b>	<ul style="list-style-type: none"><li>Producing the results that is wanted or intended; in reality, although not officially intended (Oxford Dictionary)</li></ul>
<b>Management</b>	<ul style="list-style-type: none"><li>The process of managing or being managed; the action of managing; the professional administration of business concerns, etc. (Illustrated Oxford Dictionary).</li><li>The act of managing by direction, or regulation or administration or control or supervisions (Wharton's Law Lexicon).</li></ul>
<b>Key</b>	<ul style="list-style-type: none"><li>in definition of PoEM may be read as important, main crucial, significant, vital, strategic decision</li></ul>
<b>Commercial</b>	<ul style="list-style-type: none"><li>Of engaged in, or concerned with, commerce; having profit as a primary aim rather than artistic etc. value; ((Illustrated Oxford Dictionary))</li></ul>
<b>As a whole</b>	<ul style="list-style-type: none"><li>All parts or aspects considered; altogether (The Free Dictionary by Farlex)</li></ul>
<b>In Substance</b>	<ul style="list-style-type: none"><li>'in substance' indicates that in making the necessary comparison, form should be disregarded (The Law Lexicon – 3rd Edition 2012)</li></ul>

PoEM has been 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**

# CONCEPT OF POEM – INTERNATIONAL PERSPECTIVE

## Income Tax Act, 1961

- 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
- Set of guiding principles for determination of PoEM have been issued for the benefit of the taxpayers as well as for tax administration

## OECD Commentary

- Place where
  - **key management** and **commercial** decisions that are necessary for the conduct of the entity's business as a whole are **in substance** made
- All relevant **facts** and **circumstances** must be examined to determine the place of effective management
- An entity may have more than one place of management, but it can have **only one place of effective management** at any one time

## UN Commentary

- Place where the company is **actually managed and controlled**
- where the **decision-making at the highest level** on the important policies essential for the management of the company takes place
- that plays a leading part in the management of a company from an **economic and functional** point of view
- where the most important **accounting books** are kept



# CONCEPT OF POEM - OECD



PoEM is a very fact specific determination and all the factors would need to be considered

# CONCEPT OF POEM – INDIAN TAX TREATIES

- In terms of Article 4 of the tax treaties, several Indian tax treaties, recognise inter alia, the 'place of management' as the place of tax residence
- If the company is resident of both the contracting states, then most tax treaties recognize the concept of PoEM for determination of residence of a company as a Tie-Breaker Rule for avoidance of double taxation
- India has entered into more than 90 Comprehensive tax treaties with various countries. In most tax treaties, the term PoEM is not defined
- For instance, the term PoEM is defined under a protocol in India - Belarus Tax Treaty as under:
  - A company is actually managed and controlled
  - The place where the decision making at the highest level on important policies essential for the management of a company takes place
  - The place that plays a leading part in the management of a company from an economic and functional point of view
  - The place where the relevant accounting books are kept



# CONCEPT OF POEM – INDIAN JUDICIAL RULINGS

## **[1996] 86 Taxman 252 (AAR) Natwest case**

In context of India-Mauritius DTAA, the AAR held that the word "place of effective management" refers to the place from where, factually and effectively, the day to day affairs of the companies are carried on and not to the place in which may reside the ultimate control of the company. Further, the BoD meetings and general meeting of the assessee were held at registered office of the assessee (i.e. in Mauritius), hence the PoEM is in Mauritius

## **1996 224 ITR 473 (AAR)**

Investments Company's (IC) registered office was in Mauritius and its only transaction was the investment in India. The applications made by the IC and Investment Manager to the Mauritius Offshore Business Activities Authority for residency certificate showed that their place of management would be in Mauritius. Hence, it could not be said that the effective management of the affairs of the company was not in Mauritius unless there were facts to at least prima facie indicate that such control emanated elsewhere than from Mauritius

## **DLJMB Mauritius Investment Co. v. CIT, 228 ITR 268 (AAR)**

Mind and brain of the organization of the assessee company are situated in Mauritius as the BoD meeting took place in Mauritius, where policy decisions were taken. Therefore, the 'Effective Management' is situated in Mauritius. Follows Natwest

## **Integrated Containers Feeder Services v. CIT 278 ITR 182 (2005)**

Follows Natwest case

## **SMR Investment Ltd v. DDIT 2010-TII-66-ITAT-DEL-INTL**

Order given by an Indian resident shareholder via telephone for sale of investments held by Mauritius entity may lead to PoEM in India

## **Pearl Logistics & Ex-IM Corporation v. Income-tax Officer, International Taxation, Rajkot [80 taxmann.com 217] (Rajkot - ITAT)**

Director is resident of Denmark and has been operating business wholly from Denmark, all the important decisions are taken from Denmark in the form of meeting and therefore, the place of effective management and control is Denmark only

The background is a blurred photograph of a light-colored car, possibly a convertible, parked on a paved surface. The image is framed by large, abstract geometric shapes in blue and black, which appear to be stylized architectural elements or design accents. The text "POEM GUIDELINES" is centered in the middle of the image.

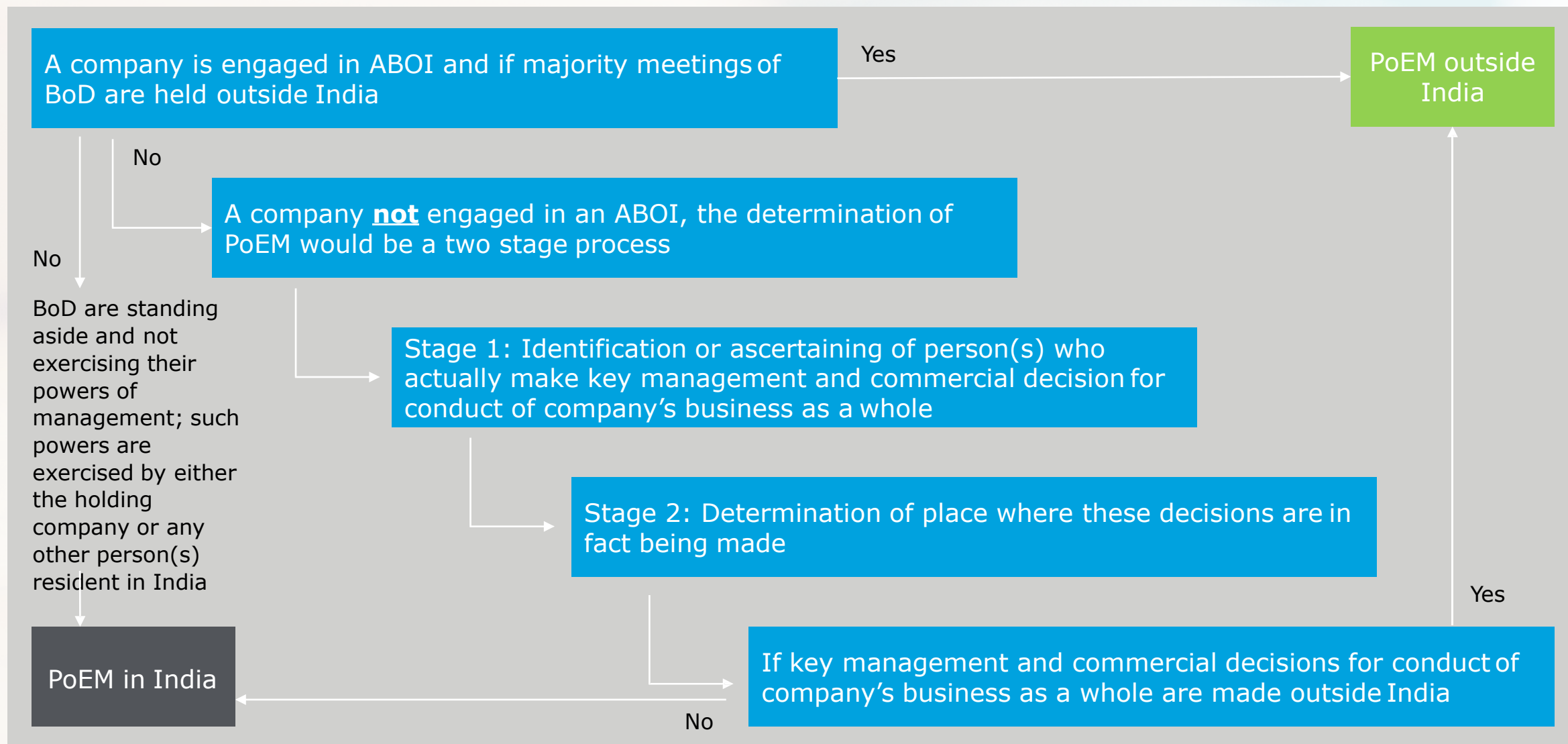
# **POEM GUIDELINES**



# POEM GUIDELINES – KEY POINTS

- The PoEM concept is one of substance over form
- The determination of PoEM depends on the facts and circumstances of a given case
- An entity may have more than one place of management but it can have only one PoEM at any point in time
- Since residence is to be determined for each year, PoEM will also be required to be determined on year to year basis
- Determination of PoEM would be primarily based on the fact whether or not the company is engaged in ABOI
- Activities performed during the previous year needs to be considered – a 'snapshot' approach is not to be adopted.
- Determination of PoEM is based on all the relevant facts rather than isolated facts
- The principles for determining PoEM are only for guidance purposes and no principle is decisive in itself.
- Where PoEM is determined to be in India and also outside India, then PoEM shall be presumed to be in India if it has been mainly / predominantly in India.

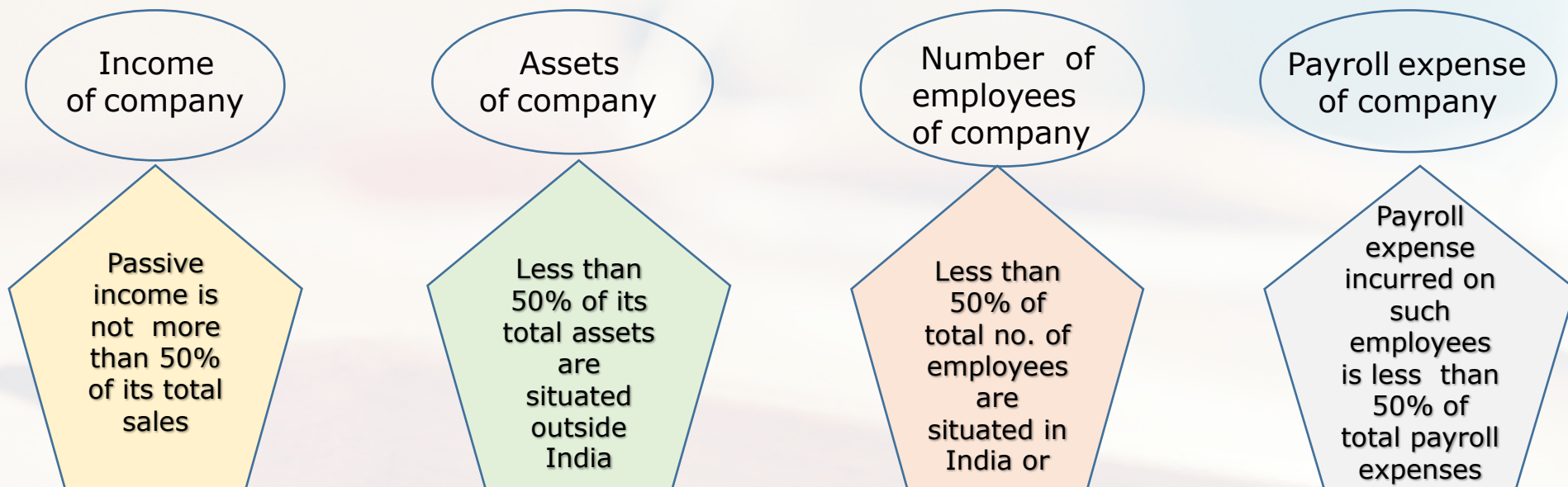
# POEM GUIDELINES - FRAMEWORK





# POEM GUIDELINES– ABOI

A company is engaged in ABOI if the following conditions are met



## Key points in determining quantum of passive income, assets, number of employee and payroll expenses

- Average of the data of the previous year and two years prior to that to be taken into account
- In case the company is in existence for a shorter period, the data of such period to be considered
- Where the accounting year for tax purposes, in accordance with the laws of country of incorporation is different from the previous year, the data of the accounting year that ends during the relevant previous year and two accounting years preceding it to be considered

# POEM GUIDELINES– for a company which doesn't have ABOI

Who takes the key management and commercial decisions	Role of BoD	Likely place of effective management
Board of Directors	<ul style="list-style-type: none"><li>• BoD retains and exercises their authority to govern the company</li><li>• BoD in substance makes such decisions necessary for the conduct of the company's business as a whole</li></ul>	<ul style="list-style-type: none"><li>• Place where BoD regularly meets and makes such decisions</li><li>• If such decisions are not taken at board meetings (i.e. if these meetings are a mere formality), then place where such decisions are in fact taken by the directors</li></ul>
Senior management  [such authority may also be delegated to shareholder, promoter, strategic or legal or financial advisory, etc.]	<ul style="list-style-type: none"><li>• BoD delegates authority to senior management</li><li>• BoD routinely ratifies these decisions that have been made</li></ul>	<ul style="list-style-type: none"><li>• Place where the senior management or other persons who makes such decisions</li></ul>
Committee  [executive committee consisting of key members of senior management]	<ul style="list-style-type: none"><li>• BoD delegates some or all of its authority to committee</li><li>• BoD merely gives a formal approval to decisions made</li></ul>	<ul style="list-style-type: none"><li>• Place where the member of the committee are based and where that committee develops and formulates the key strategies and policies</li></ul>



# POEM GUIDELINES– for a company which doesn't have ABOI

## Location of head office

(it is an important factor as it often represents the place where key management and commercial decisions are made)

Scenarios	Place of senior management	Likely place of effective management
Centrally located	<ul style="list-style-type: none"><li>• They are based in a single location at a place which is identified as head office</li></ul>	<ul style="list-style-type: none"><li>• Head office</li></ul>
Decentralised	<ul style="list-style-type: none"><li>• They operate from time to time at offices located in different countries</li></ul>	<ul style="list-style-type: none"><li>• Location where the senior management<ul style="list-style-type: none"><li>- is primarily or predominantly based</li><li>- normally return to (after travel to other locations)</li><li>- meet when formulating or deciding key strategies and policies for the company as a whole</li></ul></li></ul>
Further decentralised	<ul style="list-style-type: none"><li>• They operate from different locations on a more or less permanent basis and participate in meetings via telephone or video conferencing</li></ul>	<ul style="list-style-type: none"><li>• Location where the highest level of management (such as Managing Director or Finance Director) and their direct support staff are located</li></ul>
Highly decentralised	<ul style="list-style-type: none"><li>• Company's senior management is too decentralised</li></ul>	<ul style="list-style-type: none"><li>• Location of head office not relevant as it is not possible to determine the head office with a reasonable degree of certainty</li></ul>

# POEM GUIDELINES– for a company which doesn't have ABOI

Mode of making the key management and commercial decisions	Place of persons taking such decisions	Likely place of effective management
Meetings via telephone or video conferencing	<ul style="list-style-type: none"><li>• The directors, senior management or committee(s) taking decisions physically not present at a particular location</li></ul>	<ul style="list-style-type: none"><li>• Place where the directors or the persons taking the decisions or majority of them usually reside may be relevant</li></ul>
Circular resolution or round robin voting	<ul style="list-style-type: none"><li>• Factors like the frequency with which it is used, the type of decisions made in that manner and where the parties involved in those decisions are located, etc. are to be considered</li></ul>	<ul style="list-style-type: none"><li>• It cannot be said that proposer of decision alone would be relevant but based on past practices and general conduct, it would be required to determine the person who has authority and who exercises authority to take decision; location of such person would be more important</li></ul>



# POEM GUIDELINES– for a company which doesn't have ABOI

## Is shareholder a person who makes the key management and commercial decisions?

Matters which are reserved for shareholder decision under the company laws	<p>Such decision may include:</p> <ul style="list-style-type: none"><li>• sale of all or substantially all of the company's assets</li><li>• dissolution, liquidation or deregistration of the company</li><li>• modification of rights attaching to various classes of shares or the issue of a new class of shares, etc.</li></ul>	<ul style="list-style-type: none"><li>• Not relevant for determining PoEM</li><li>• These decision typically affect the existence of the company itself or the rights of the shareholders as such, rather than the conduct of the company's business from a management or commercial perspective</li></ul>
Shareholders involvement turning into effective management	<p>Either formally by way of shareholder agreement or by way of conduct:</p> <ul style="list-style-type: none"><li>• Shareholders limit the authority of board and senior management of a company and thereby remove the company's real authority to make decision</li></ul>	<ul style="list-style-type: none"><li>• The shareholder guidance transforms into usurpation and such undue influence may result in effective management being exercised by the shareholder</li></ul>

# POEM GUIDELINES– for a company which doesn't have ABOI

## Does day-to-day routine operational decisions constitute key management and commercial decisions?

Day-to-day routine operations decision undertaken by junior and middle management

Examples of operational decision:

- a decision by the plant manager (appointed by senior management) to run the facility
- decision concerning repairs and maintenance
- decision relating to the implementation of company wide quality controls and human resources policies

Examples of key management and commercial decisions:

- a decision to open a major new manufacturing facility
- a decision to discontinue a major product line

- The operation decisions relate to the oversight of the day-to-day business operations and activities of a company whereas the key management and commercial decision are concerned with broader strategic and policy decision
- Not relevant for determining PoEM

In case if the person responsible for taking operational decisions and key management and commercial decisions is the same person, it will be necessary to distinguish the two type of decision and thereafter assess the location where the key management and commercial decisions are taken

# POEM GUIDELINES– for a company which doesn't have ABOI

If all of the above discussed factors do not lead to clear identification of PoEM	
Secondary factors to be considered	<ul style="list-style-type: none"><li>• Place where main and substantial activity of the company is carried out</li><li>• Place where the accounting records of the company are kept</li></ul>
Isolated factors by itself do not establish PoEM	
Ownership	<ul style="list-style-type: none"><li>• The fact that a foreign company is completely owned by an Indian company will not be conclusive evidence that conditions for establishing PoEM in India have been satisfied</li></ul>
Permanent establishment	<ul style="list-style-type: none"><li>• The fact that there exists PE of a foreign entity in India would itself not be conclusive evidence that the conditions for establishing PoEM in India have been satisfied</li></ul>
Directors residential status	<ul style="list-style-type: none"><li>• The fact that once or some of the directors of a foreign company reside in India will not be conclusive evidence that conditions for establishing PoEM in India have been satisfied</li></ul>
Local management	<ul style="list-style-type: none"><li>• 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</li></ul>
Support activities carried out in India	<ul style="list-style-type: none"><li>• 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</li></ul>



# POEM GUIDELINES– PROCEDURAL SAFEGUARDS

## Before considering POEM of F.Co in India

- AO to seek prior approval of collegium of 3 members consisting of PCIT/CIT



## Opportunity of being heard

- Collegium shall provide an opportunity of being heard
- Pass directions

- Unlike GAAR – panel consists of revenue members.
- No explicit requirement of providing copy of direction to assessee.
- Possible to invoke writ jurisdiction since directions per se are not appealable?

# CONSEQUENCES OF POEM

- Global Income taxable in India at 40% (plus surcharge/Cess)
- Applicability of TP provision including reporting of international transaction and maintenance of TP documentation.
- Applicability of withholding provisions – unless payment falls within source rule exclusions under domestic law.
- Compliance in form of filing of ROI, TDS return, equalization levy etc.
- Interest and penalty in cases where POEM is determined in India during tax scrutiny

# TRANSITIONAL PROVISIONS - POEM

- Computation of income of FCOs turning first time resident in India to be dealt with by section 115JH read with Notification dated 22<sup>nd</sup> June 2018.
- Following manner of computation prescribed

Aspect of Computation	Mechanism
Depreciation	<ul style="list-style-type: none"><li>• Opening tax WDV if FCO is assessed to tax in foreign country</li><li>• Opening book WDV in other cases</li></ul>
Past Losses and Unabsorbed Depreciation ("UAD")	<ul style="list-style-type: none"><li>• Brought forward loss or UAD on first day of previous year as computed under tax laws</li><li>• Brought forward loss or UAD on first day of previous year in other cases</li></ul>

- Tax withholding provisions applicable – in case of conflict withholding provision applicable to NR applies
- FCO entitled to relief or deduction of taxes paid in accordance with section 90 /section 91
- Tax rate of 40% applicable



## ARTICLE-4(1) of MLI – Dual Resident Entities

*1. Where by reason of the provisions of a Covered Tax Agreement a person other than an individual is a resident of more than one Contracting Jurisdiction, the competent authorities of the Contracting Jurisdictions shall endeavour to determine by mutual agreement the Contracting Jurisdiction of which such person shall be deemed to be a resident for the purposes of the Covered Tax Agreement, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by the Covered Tax Agreement except to the extent and in such manner as may be agreed upon by the competent authorities of the Contracting Jurisdictions.*

- POEM is no more a Tie-breaker rule
- Competent authorities of both states would resolve dual residency of Non-Individuals
- POEM may be one of the criteria in their examination.
- This change is on account of abuse of POEM concept in past.

## ARTICLE-4 of MLI – Dual Resident Entities

- India's domestic POEM test prescribes an active and passive income test that is usually applied only in the context of certain anti-avoidance measures like controlled foreign company (CFC) provisions.
- It is also unlikely that India's treaty partners will be agreeable to dual residence of a taxpayer being resolved in favor of India simply because it meets the criteria prescribed in India's domestic POEM test.
- India's tax treaties with France, Singapore, Mauritius, the Netherlands and the UK contain provisions similar to the language of erstwhile Article 4(3) of the OECD Model Tax Convention where POEM is a Tie-breaker.
- India's treaties with Sweden, Ireland and Luxembourg, in addition to the POEM test, also provide for the mutual agreement procedure where the POEM cannot be determined.
- Countries such as France, Sweden, Luxembourg and Singapore have reserved the right for Article 4 to not apply to their CTAs. Accordingly, the existing tie breaker in India's tax treaties with these countries remains unchanged. Therefore with regard to these jurisdictions, the treaty POEM test will continue to apply in cases of dual residence.

# POEM – Role in Tax Treaties

Treaty Partners to India	Determining of residential status by the Treaty partners
<b>Netherlands</b>	<ul style="list-style-type: none"><li>• Netherlands have also opted for article 4 of MLI to apply to their bilateral tax treaties.</li><li>• Domestic Law states that residential status will be based on place of incorporation or according to circumstances.</li><li>• Various judgments summarizes that residential status will prevail at places where strategic managerial decisions are made and also factors such as place of board meetings, residence of board members, location of shareholder meetings and place where accounts are kept etc. are also considered.</li><li>• The reliance of aforementioned factors could result in difference of opinion between Indian and Dutch tax authorities in understanding POEM in the treaty context.</li></ul>
<b>United Kingdom</b>	<ul style="list-style-type: none"><li>• United Kingdom have also opted for Article 4 of MLI to apply to their bilateral tax treaties.</li><li>• Domestic law uses the criteria of control and management to determine residential status.</li></ul>
<b>Singapore</b>	<ul style="list-style-type: none"><li>• Singapore has expressed a reservation in respect of Article 4 of the MLI therefore POEM is the tie-breaker under the treaty.</li><li>• Domestic law uses the criteria of control and management to determine residential status. which means the location of BOD meetings during which strategic decisions are made will be a key factor.</li><li>• Therefore there are likely chances of conflict between the views of India and Singapore Tax authorities in respect of POEM concept.</li></ul>





THANK YOU



# Latest International Tax Judgements

Hyderabad,  
SIRC of ICAI

Sudarshan Rangan  
[Sudarshan@inbox.com](mailto:Sudarshan@inbox.com)

# Agenda



Bucket I – PE (Home office)

Bucket II – FTS/IPS/DPS (MFN & Make-Available)

Bucket III- Foreign Tax Credit

Bucket IV – Watch Out For...



# Intro(retro)spect.....



Businesstoday.in



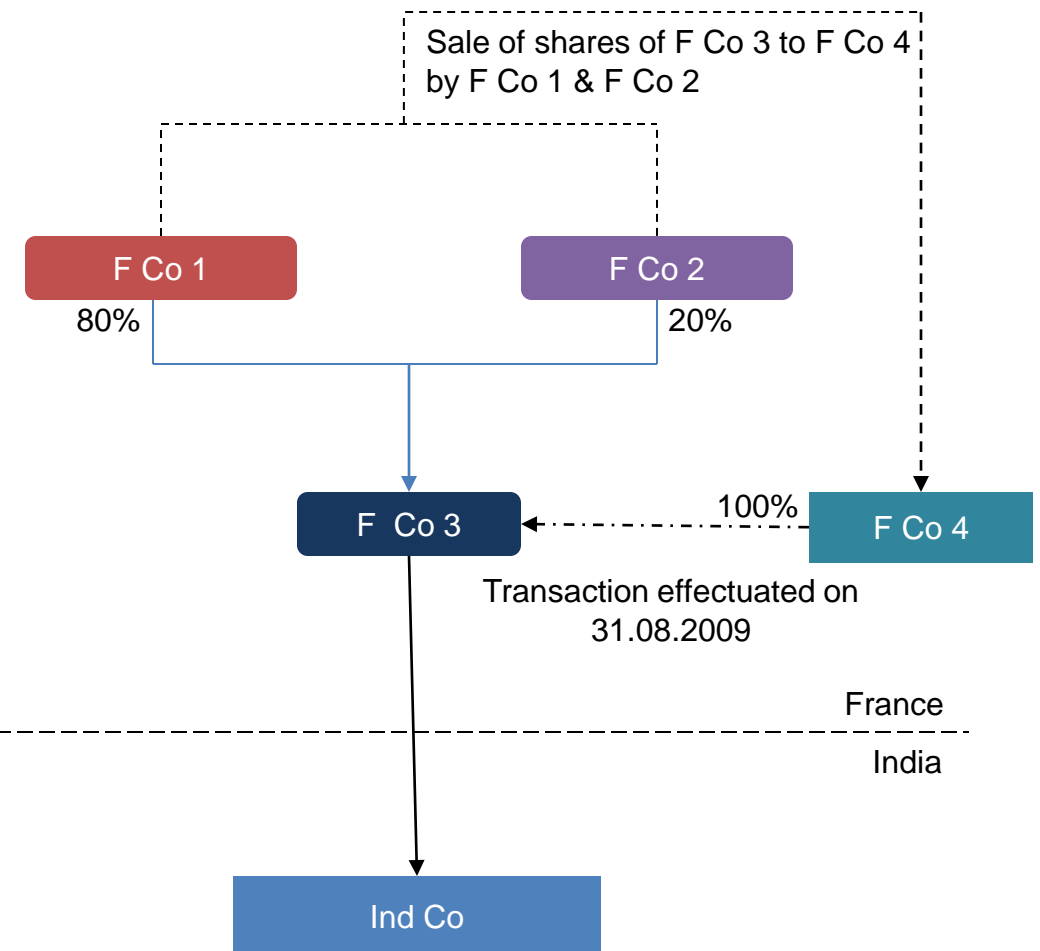
indiatoday.in

- Tax Treaties and Investment Treaties (Interplay)
- Exclusive Tax Carveout Clause
- Fair and Equitable Treatment
- Sovereignty Debate – more than 30 odd cases on ISDS
- The saga continues- Enforcement of the award
- Treaty Shopping
- Larger regulatory ramification – Termination of Treaty, New Model BIT, Outbound Investors Safeguard, India-Brazil (BIT)
- Future of investment treaties?

# Case Study - Taxation of Indirect Transfer

[2013] 30 taxmann.com 222 (Andhra Pradesh)

- F Co 1 and F Co 2 holds 80% and 20% respectively in F Co 3.
- A share purchase agreement was entered into between three Non - Residents, F Co 1 / F Co 2 (the sellers) and F Co 4 (the buyers) to sell the shares of F Co 3.
- Application was filed before the AAR to determine whether capital gains arising out of transfer of shares of a non-resident company between two non-residents is taxable in India.
- The AAR ruled that the transactions are part of a scheme for avoidance of tax and taxable in India as per the Income Tax Act and Article 14(5) of the Double Taxation Avoidance Agreement (DTAA). A Writ Petition was filed against the said AAR.
- Issues which were considered before the AAR was Whether the capital gains arising out of transfer of shares of a non-resident company between two non-residents is taxable in India.
- Whether a foreign company, which has no business activity except holding shares in an Indian company and which was subsequently converted into a joint venture only for the purposes of holding shares in the Indian company, can be considered as a company with economic substance or can it be ignored being a puppet subsidiary for the purposes of imposing tax liability.





Bucket I – Home office PE



# #1 Danish Tax Council – Home Office as PE

[TS-741-FC-2020(DEN)] - **Assessee**

- British Co. engaged in managing Investment funds in certain markets.
- One of its employee, worked from her Danish home – Once in a week basis
- The employment contract stipulates place of work as London. The employee focuses on various markets and not specifically Denmark.
- Work from home for private reasons and not on Employer insistence.
- Employer has no business interest in the employee performing work from Denmark
- The employee will thus still perform most of his work from the office in London, and Employer will thus still make office facilities available to the employee in London.
- The employee's work will not change character as a result of the employee moving



# Home office as a Fixed place PE



## Article 5(1) of India-USA DTAA

### ☐ Fixed Place PE-

- ☐ Duration
- ☐ Disposal
- ☐ Fixed place for Carrying on the business

### ☐ Duration Test: Formula one , UN Model 2017 commentary para 6 on permanency

### ☐ Disposal: The reason for using the home office?

## Home office : Fixed place PE

It is worth mentioning that there is no direct judicial precedence directly connected to home office PE in India.

July 2015- Swedish tax agency guidance.

- ✓ if it has been agreed that the employee should perform work from home, or if there is an implied agreement that the employee should work at home;
- ✓ if the employee has an office or workplace in another country where he or she can perform work;
- ✓ the amount of work performed from the employee's home;
- ✓ the permanency of the work performed from the employees' home; and the type of work that is performed from the employees' home.

The Swedish tax agency also provided a disclaimer that actual circumstances and facts must be reviewed. Blind reliance on employment contract must be avoided.



## Home office : Fixed place PE

*“18. Even though part of the business of an enterprise may be carried on at a location such as an individual’s home office, that should not lead to the automatic conclusion that that location is at the disposal of that enterprise simply because that location is used by an individual (e.g. an employee) who works for the enterprise. Whether or not a home office constitutes a location at the disposal of the enterprise will depend on the facts and circumstances of each case.*

*In many cases, the carrying on of business activities at the home of an individual (e.g. an employee) will be so intermittent or incidental that the home will not be considered to be a location at the disposal of the enterprise (see paragraph 12 above). Where, however, a home office is used on a continuous basis for carrying on business activities for an enterprise and it is clear from the facts and circumstances that the enterprise has required the individual to use that location to carry on the enterprise’s business (e.g. by not providing an office to an employee in circumstances where the nature of the employment clearly requires an office), the home office may be considered to be at the disposal of the enterprise.*

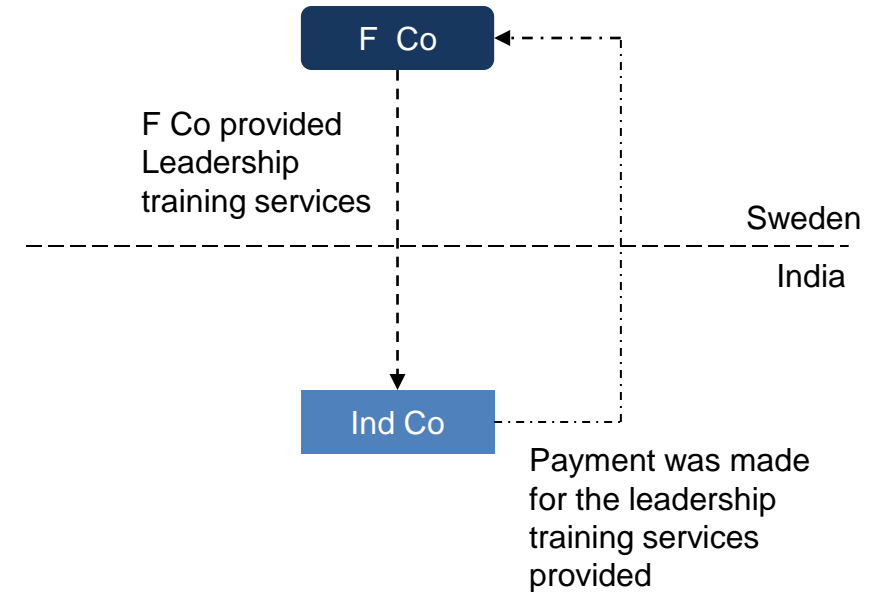


Bucket II– FTS, IPS, DPS  
(Make available & MFN)

## #2 Sandvik AB \_ FTS\_Pune ITAT

[TS-13-ITAT-2021(PUN)] - **Assessee**

- F Co was a company incorporated in Sweden. F Co filed a return of income in India declaring a total income of INR 4.05 Crores.
- During the year under consideration, the Company had received an amount of INR 22 Lakhs from Ind Co towards leadership training charges.
- The said amount was designated as training fees (Non-technical services) not chargeable to tax as "fees for technical services" in India under the DTAA read with the Protocol as expanding to the DTAA between India and Portuguese.
- The AO did not accept the F Co's contention of the latter's entitlement to the limited scope of the term 'fees for technical services' as given in the India and Portuguese DTAA.
- The same was upheld by the first appellate authority.





# Discussion – MFN and Make available Conundrum

- Whether benefit of India Portuguese DTAA can be allowed in terms of MFN clause in the Protocol to India Sweden DTAA?

Whether training fee for leadership satisfy the make available test?

## MFN Eligibility

- SCA Hygiene Products AB -[TS-4-ITAT-2021(Mum)] in favour of assessee .
- Notification not needed for Swedish MFN
- Steria – Delhi HC in favour of the assessee
- Useful for dividend taxation regime – Slovenia Dividend Rate of 5%

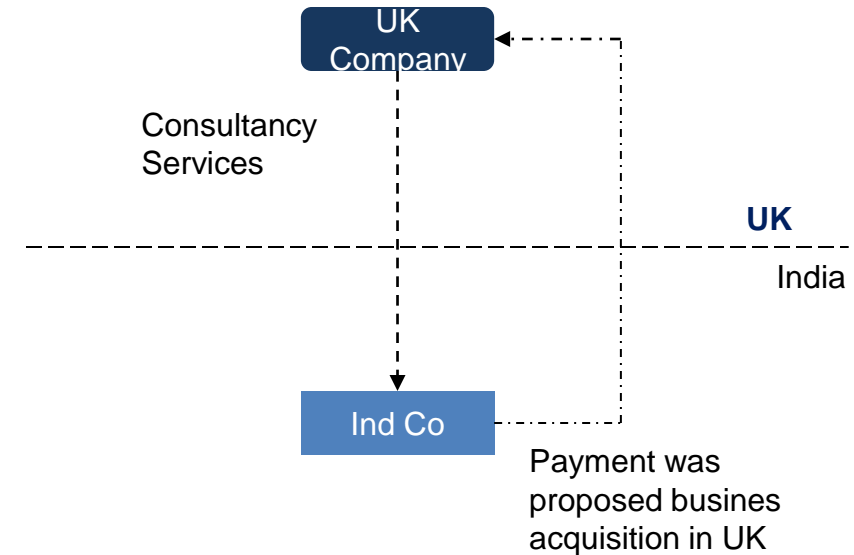
## Make-Available

- The imparting principle - the person acquiring the service is enabled to apply the technology (India-USA DTAA)
- General Motors (MUM-ITAT 2020); Foster Wheeler-Chennai ITAT followed Cochin Bench in US Technology [TS-62-ITAT-2016(CHNY)] .
- **Perfetti** -position to derive an enduring benefit and to utilize the knowledge in future on his own

# #3 Shriram Capital \_ FTS\_ Madras HC

[2020] 122 taxmann.com 281 (Madras)– **Revenue**

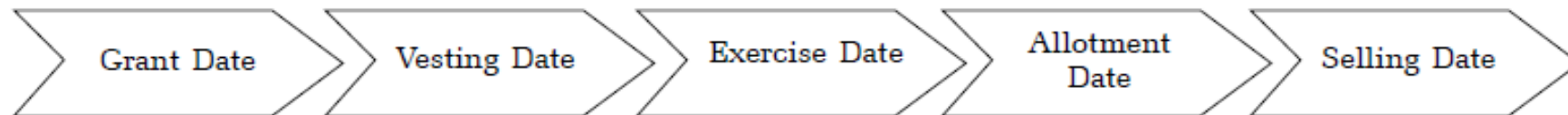
- The assessee an Indian Co. availed consultancy services of a UK company for the following services :
  - i. Evaluation, development of risk management and insurance products for the renewable energy sector for various overseas ventures of Shriram.
  - ii. Insurance and pricing considerations for SME & specialist insurances *e.g.* Bankers Indemnity, Jewellers Block *etc.*
  - iii. Co-ordination for RI placements including getting quotations for large industrial risks and other major risks.
  - iv. Explore **London** market for types and scope of insurance available for serious complex fraud, *etc.*
  - v. Provision of information on general matters of interest, innovative risks transfer, new products and risks from UK market *etc.*
  - vi. Provide facilitation and overseas the services as part of UK retainers responsibilities mainly to ensure that Shriram and International brokers are using, providing and capitalizing on the relationship for mutual business development *etc.*
- The assessee contended that the income is not taxable under the ITA and the India-UK tax treaty.
- Writ was filed before the HC after the revision petition u/s 264 was rejected.



## #4 Shri Unnikrishnan\_ITAT Mumbai \_Article 15

[2021] 123 taxmann.com 238 (Mumbai - Trib.) - **Revenue**

- A non-resident assessee had exercises shares allotted by his employer as an ESOP during the impugned AY. The relevant dates of ESOP is as follows:
  - Date of Grant – 25 June 2007 (assessee was a tax resident)
  - Vesting date- 27 June 2008 (50%) & 27 June 2009 (50% ) (Assessee was a non –resident)
  - Exercise date- FY 2012-13 (AY 2013-14) –Impugned AY.
- The difference between the market value and grant price was taxed as perquisite by the Employer and TDS was deducted.
- The assessee has claimed the TDS as refund on the grounds that the income is not taxable under Section 5(2) of the ITA as the ESOP accrued during his time in Dubai when he was a non-resident and accordingly does not accrue or arise in India. The assessee also contended that under the India-UAE tax treaty, the taxing right belongs to the UAE as per Article 15.
- Both the AO and the CIT(A) dismissed the contentions of the assessee leading to an appeal to the ITAT.





# #5 Italian Revenue Ruling – September 2020

Agenzia Entrate [TS-727-FC-2020(ITL)]

- The case concerned an individual that had been working for the Italian subsidiary of a MNE between 2003 and 2016. In 2010 he received certain stock options, which he could exercise after a 3-year vesting period. After the date of vesting, he moved to Switzerland to work for another company of the MNE, where he later exercised the options while being a Swiss tax resident. The relevant inputs are as follows:
  - Date of Grant – 2010 (Employment in Italy)
  - **Vesting date- 2013 ((Employment in Italy)**
  - Exercise date- 2014/15/16 (Employment in Switzerland)
- The Revenue Agency held :
  - (i) characterized the income derived from the exercise of the stock options as employment income under Italian tax law;
  - (ii) regarded that income as **sourced in Italy** under domestic sourcing rules;
  - (iii) concluded that Italy also maintained the primary taxing right over that income, as source State, under Article 15 of the Italy-Switzerland tax treaty (following the OECD Model).

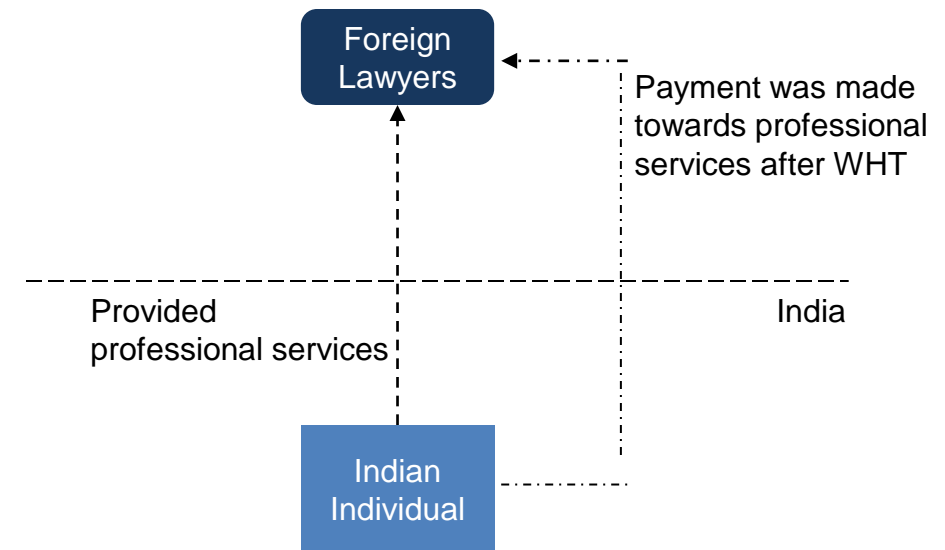
With regard to (iii) the Revenue Agency maintained that the stock option benefits should be regarded as linked to the employment activities performed in Italy during the vesting period, for which Article 15(1) and (2) allow taxation in the State where the activities are performed without any time limitation (see also para. 12.1 of the OECD Commentary on Article 15)

## #6 Shri Hariharan Subramanian \_ITAT Delhi

[TS-576-ITAT-2020(DEL)] –

- An Indian Intellectual Property attorney had engaged various foreign IP law firms for filing patent applications, trademark registration etc on behalf of its Indian Clients.
- The assessee had not withheld tax u/s 195 for payments made to law firms situated in certain countries on the reason that these incomes are not taxable under Section 9(1)(vii) of the ITA and only Section 194 J stipulates professional services.
- Assessee had also contended that under tax treaty, the incomes fall in the nature of IPS and wherever IPS under Article 14/15 is not triggering, then it will come under Article 7 read with Article 5 as business income not taxable on account of no PE.
- The AO and CIT (A) had disallowed the expenditure made to the non-resident entities for legal services under Section 40(a)(i) for failure to withhold taxes.

Brazil, China, Japan, Indonesia, Malaysia, Russia, Srilanka, Australia etc.





## Bucket III– Foreign Tax Credit

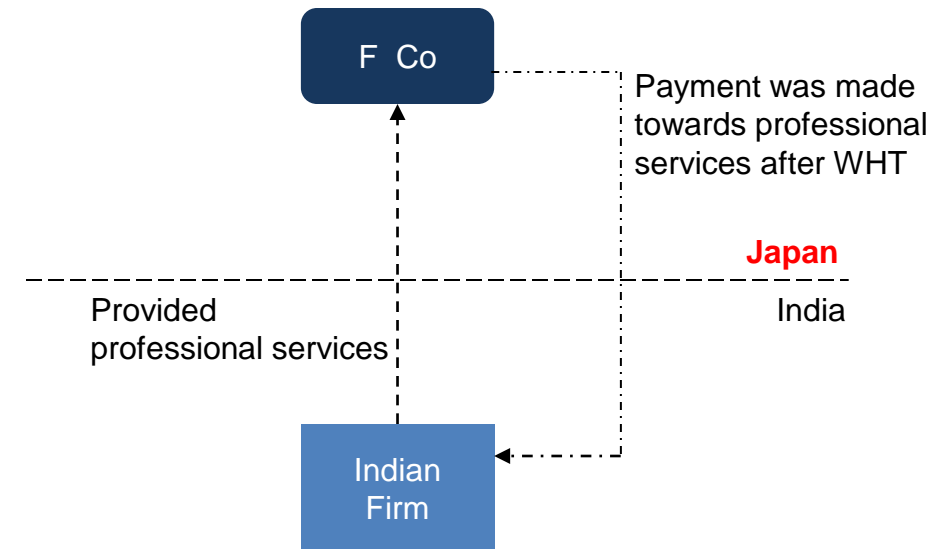


# #7 Amarchand Mangaldas \_ITAT Mumbai

[TS-666-ITAT-2020(Mum)] - **Assessee**

## Facts of the case

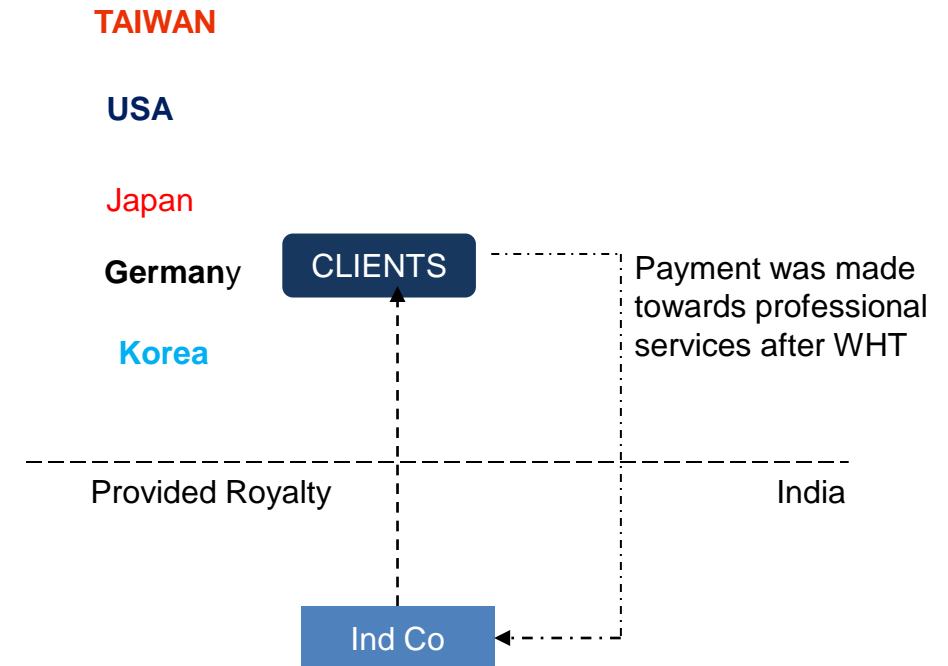
- Ind Co a leading law firm in India had provided certain professional services to F Co, a Company in Japan.
- At the time of making payment towards professional fees, F Co withheld taxes under article 12 of Indo – Japan DTAA treating professional fess earned by Ind Co in Japan as taxable in Japan.
- Ind Co had claimed foreign tax credit in respect of taxes withheld by the F Co. However, at the time of assessment, Assessing Officer (AO) had disallowed the FTC claimed by Ind Co on the ground that the income so earned could only have been taxable under article 14 for the 'independent personnel services'. Since taxes had been wrongly withheld in Japan, Ind Co was not entitled to an FTC in respect of the same.
- An appeal was filed before the ITAT against the order passed by the AO.



## #8 ITTIAM Systems\_ ITAT Bangalore

TS-22-ITAT-2021(Bang) - **Assessee**

- Assessee, an Indian Technology Company claimed FTC in respect of taxes withheld on royalty payments by its foreign client amounting to INR 180,54,300.
- The foreign clients who had withheld the taxes were from the USA, Japan, Germany, Korea and Taiwan.
- Assessee claimed the entire FTC as it worked out to an effective tax rate of 14.32% in respect of income tax outside India and the effective tax rate in India worked out to be 32.45%.
- However, Revenue opined the effective tax rate outside India was calculated by assessee on receipts whereas the effective tax rate payable in India was calculated on income and thus there was a difference of 9.9% between effective tax rate outside India on receipts and effective tax rate in India on income.
- CIT (Appeals) undertook a similar approach as AO and thereby did not provide the full FTC.



A person in a dark suit is seen from the back, looking out over a city at night. The city lights are visible in the distance, creating a blue-tinted silhouette effect.

Bucket IV– Coming Soon



## 5 Cases to watch out for at the Court level

S.no	Case	Issue
1	Sanofi Pasteur SA	Indirect Transfer
2	Sony Ericcson Mobile	Marketing Intangibles – TP
3	Tiger Holdings – Bombay HC	Indirect Transfer
4	New Skies Satellite	Royalty Tax on Satellites, Communication and Transmission
5	Engineering Analysis Center of Excellence	Royalty on Computer Software license

*"The longing for certainty... is in every human mind. But certainty is generally illusion."* Justice Oliver Wendell Holmes

# Stay Safe and Stay Healthy!!



**@sudarshrangan**



**Sudarshan Rangan**



**Sudarshan@inbox.com**



Source : insurancejournal.com