

**Date:** 6<sup>th</sup> January 2016

**Kind Attn:**

**Director (Tax Policy & Legislation)-I**  
**Central Board of Direct Taxes,**  
Room No. 147-D,  
North Block,  
New Delhi – 110001.

By email

**Subject: Comments on draft ‘Guidance on POEM’.**

**Ref: Draft Guiding Principles for determination of Place of Effective Management (‘POEM’) of a Company issued on 23<sup>rd</sup> December 2015 vide F. No. 142/11/2015-TPL**

**Dear Sir,**

We are grateful for the opportunity to comment and provide suggestions on the draft ‘Guidance on POEM’.

The guiding principles proposed to be followed in determination of POEM are comprehensive enough to stem the tax avoidance opportunities. On an analysis of the proposed guidelines, however, there are some concerns - as listed in the following paragraphs - which we request you to kindly address:

**1. Definition of “Passive Income”**

1.1. Under paragraph 5(c), “Passive income” has been defined to include *“income from the transactions where both the purchase and sale of goods is from / to its associate enterprises”*. Although it may be desirable to identify and tax the controlled foreign company income which is earned without any underlying value accretion in order to curb base erosion in India, there may be many unintended streams of income which could consequently fall within this part of definition of ‘Passive Income’. This could be as common for an MNC having presence in various regions of the world corresponding to different functions in its global value chain.

- 1.2. Consider for example – A foreign company acting as a manufacturing hub for all the products of the group which sources raw material from its AE located in a resource rich nation. It thereafter sells the products to all its AEs across the world including its parent company in India. In accordance with this definition, the income earned by such foreign company would be labeled as ‘Passive Income’ although conceptually it could not possibly be categorized as ‘Passive Income’ at all.
- 1.3. We therefore request you to kindly remove this specification from the definition of ‘Passive income’ altogether.

## **2. Definition of “Senior Management” and guiding principles in identification of POEM**

- 2.1. Under paragraph 5(d), “Senior Management” has been defined to mean 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. The persons designated as ‘Senior Management’ within a company are usually vested with substantial powers of control and management of the company; but typically they make *decisions which are operational in nature* leaving the *key management and commercial decisions* to be taken by the Board of Directors. Such legitimate distinction should be made part of the guidelines as it is critical in the context of establishing the POEM.
- 2.2. As a consequence, once the place can be identified – in accordance with paragraph 8.2(a) – where the Board of Directors regularly make key management and commercial decisions, then the location of the company’s “Head office” should cease to be of any importance. We therefore kindly request that such hierarchy should be specified in the final regulations.
- 2.3. Further, if POEM is to be determined in accordance with paragraph 8.2(c), it remains unclear regarding till what chain of command the persons within the meaning of ‘Senior Management’ would be relevant to recognize and consider in identifying the location of ‘Head Office’. We kindly request clarity on this aspect so that this process eliminates subjectivity.

### **3. POEM at one place or two places?**

3.1. It has been mentioned at paragraph 6 initially that a company can have only one POEM; whereas towards the end of the guidelines, paragraph 10 states that POEM shall be presumed to be in India if it is determined that POEM during the previous year is in India and also outside India. If it is to be believed that these guidelines would lead to a precise conclusion, then there cannot be a situation of duality of POEM.

3.2. These paragraphs contradict each other and therefore need reconciliation.

We sincerely hope that the above comments may be useful to the CBDT.

**Yours sincerely,**

**Pankaj Bhuta** [B.Com (Hons.), F.C.A.]

**Harshal Bhuta** [M.Com., F.C.A., A.D.I.T., LL.M. (Hons.) in International Tax Law [WU (Vienna)]]

**Tanvi Vora** [M.Com, A.C.A.]



**P. R. BHUTA & CO. Chartered Accountants**

**Address** : 2-I, Jeevan Sahakar, 2nd Floor,  
Sir P. M. Road, Fort,  
Mumbai – 400001, India.

**Telephone** : +91 22 22660010/3427; 43471727

**Fax** : +91 22 22662793

**E-mail** : [info@bhutaco.com](mailto:info@bhutaco.com)

**Website** : [www.bhutaco.com](http://www.bhutaco.com)