

## Preface

1. **Author has felt when he qualified as Chartered Accountant (CA) in Year 1985 that legal provisions' interpretations are big challenge for legal professionals, govts' officials and public at large in India and outside India.**
2. **Author has realized that something should be developed to resolve this challenge in India and outside India.**
3. **Author has started compiling Frequently Asked Questions (FAQs) on many subjects where his 100% answers are precisely based on Yes or No i.e. white or black nothing is grey**
4. **Author has compiled approximately 150 +(plus) research papers / books with 25 thousand +(plus) pages on many prevailing subjects / acts in India and outside India.**
5. **Author's 1<sup>st</sup> paper book is now being published under head FAQs on Enforcement Directorate (ED) where 571 FAQs are replied based on Yes or No i.e. white or black nothing is grey**
6. **This book is also containing**
  - (i) Foreign Exchange Management Act (FEMA) 1999 and rules / regulations
  - (ii) Prevention of Money Laundering Act (PMLA) 2002 and rules / regulations
  - (iii) Fugitive Economic Offenders Act (FEOA) 2018 and rules / regulations
7. **This book is published with Sai Kripa and dedicated to my father (late) Mr. M.R. Agarwal, Mother Mrs. R.D. Agarwal, wife Mrs. Snigdha Agarwal, daughter Ms. Soumya Agarwal, daughter Ms. Sanya Agarwal and dedicated team headed by Rajat Kumar**

● **I trust that you will be enriched by reading this book**

With best wishes,  
**CA. Satish Agarwal**  
B. Com (Hons.) FCA

[satishagarwal307@yahoo.com](mailto:satishagarwal307@yahoo.com)  
+91-9811081957  
[www.femainindia.com](http://www.femainindia.com)

## ***Author's Profile***

***Mr. Satish Agarwal (FCA) is heading M/s Satish S Agarwal & Co. Chartered Accountants since 1985 with a team of dynamic young professionals serving clients from various business sectors including public listed companies and government undertakings. Firm was also registered with PCAOB (USA) for undertaking audits and other work of US GAAP.***

***He is regularly advising on several matters to Institute of Chartered Accountant of India (ICAI) and also to Ministry of Commerce (MoC) for Foreign Trade Agreements (FTAs) and World Trade Organization (WTO) for securing India's best interests.***

***He is continuously advising on Foreign Investments (FIs) in India and also on Overseas Direct Investments (ODIs) outside India.***

***He is known for his expertise in incorporating companies in most of countries across the world.***

***He has written around 150 +(plus) Research papers / books containing 25 thousand +(plus) pages available "freely" on certain portals like:***

[https://taxguru.in/author/satishagarwal307\\_1957](https://taxguru.in/author/satishagarwal307_1957)

Or

[www.femainindia.com](http://www.femainindia.com)

***Few out of abovementioned Research papers / books are as under:***

1. *Book on Enforcement Directorate (ED) in India- (Book with 617 pages)*
2. *Director of Revenue Intelligence (DRI) in India*
3. *Central Bureau of Investigation (CBI) in India*
4. *National Investigation Agency (NIA) in India*
5. *Serious Fraud Investigation Office (SFIO) in India*
6. *Financial Intelligence Unit (FIU-IND) in India*
7. *Central Vigilance Commission (CVC) in India*
8. *Narcotics Control Bureau (NCB) in India*
9. *Research & Analysis Wing (R&AW) in India*
10. *Economic Offence Wing (EOW) in India*
11. *Intelligence Bureau (IB) in India*
12. *Director General of Income Tax Criminal Investigation (DGITCI) in India*
13. *National Company Law Tribunal (NCLT) in India*
14. *Security Exchange Board of India (SEBI) in India*
15. *Prevention of Corruption (PC) Act,1988 in India*

16. *Foreign Assets Investigation Unit (FAIU) in India*
17. *Book on International Financial Services Center (IFSC) in India (Book with 290 pages)*
18. *Replacement of Indian Penal Code (IPC) Criminal Procedure (CP) & Evidence Act (EA) in India*
19. *Undisclosed Foreign Income & Asset (UFIA)-Black Money Act, 2015*
20. *Statutory provisions for General Anti Avoidance Rule (GAAR) in India*
21. *Reserve Bank of India (RBI) Act, 1934*
22. *Foreign Exchange Management Act (FEMA) 1999 in India*
23. *Benami Transactions (Prohibition) Amendment Act, 2016 in India*
24. *Advance Pricing Agreements (APAs) in India*
25. *Annual Performance Report (APR) for Investments outside India*
26. *Foreign Trade Agreements (FTAs) executed by India*
27. *Statutory Obligations for Companies Operating in India*
28. *Significant Beneficial Owners (SBO) in India*
29. *Significant Economic Presence (SEP) in India*
30. *Place of Effective Management (POEM) in India*
31. *Liberalized Remittance Scheme (LRS) for residents of India*
32. *Foreign Liability and Asset (FLA) return in India*
33. *FATCA agreement with USA*
34. *Double Taxation Avoidance Agreement (DTAA) with USA*
35. *Foreign Tax Credit (FTC) in India*
36. *Corporate Frauds (CFs) in India*
37. *Export of Goods and Services under FEMA, 1999 in India*
38. *Imports of Goods and Services under FEMA, 1999 in India*
39. *External Commercial Borrowings (ECBs) in India*
40. *Overseas Direct Investments (ODIs) under FEMA, 1999 in India*
41. *Acquisition of Immovable Properties by Non-residents under FEMA, 1999 in India*
42. *Compounding of Contraventions under FEMA, 1999 in India*
43. *Foreign Branch Office (BO) + Liaison Office (LO) + Project Office (PO) under FEMA, 1999 in India*
44. *Annual Information Statement (AIS) in India*
45. *Investments by Non-Residents (NRIs) in India*
46. *Guidance for Doing Business in United States of America (USA)*
47. *Corporate Tax (CT) Law in UAE*
48. *Acquisition & Transfer for Immovable Properties by Non-Residents (NRs) in India*
49. *Foreign Company's Registration in India*
50. *Auditor Checks and Reporting for Indian Companies in India*
51. *Companies Auditor Report Order (CARO) 2020 in India*
52. *Tax Audit Report (TAR) + Accounting Standard (ASs) in India*
53. *World Trade Organisation (WTO) & Benefits for India*
54. *Deposits by Corporate in India*
55. *Expatriates + Foreign Citizens in India*
56. *Book on Foreign Investments (FIs) by Non-Residents of India (Non-RoI) (Book with 346 pages)*



## 41 FAQs on POEM on company located outside India but operated from India

<b>INDEX</b>		
<b>S.No</b>	<b>Topic</b>	<b>Page No.</b>
<b>(A) Briefs on POEM for companies located outside India but controlled from India</b> <span style="float: right;">3</span>		
1.	<b>Briefs on introduction for POEM's application in India</b>	<b>4 &amp; 5</b>
2.	<b>Briefs on criteria's for POEM's application in India</b>	<b>5</b>
3.	<b>Briefs on OECD role's for POEM's application in India</b>	<b>5 &amp; 6</b>
4.	<b>Briefs on important factors for POEM's application in India</b>	<b>6 &amp; 7</b>
5.	<b>Briefs on Safe harbor provisions for POEM's application in India</b>	<b>7 &amp; 8</b>
6.	<b>Briefs on issuing guidelines for POEM's application + transfer pricing (TP) principles</b>	<b>8</b>
7.	<b>Briefs on Mutual Agreement Procedure (MAP) for POEM's application in India</b>	<b>8</b>
8.	<b>Briefs on POEM's application up to march 31<sup>st</sup> 2016 under section 6(3)(ii) of ITA, 1961</b>	<b>8</b>
9.	<b>Briefs on POEM's application from April 01<sup>st</sup> 2016 under section 6(3)(ii) of ITA, 1961</b>	<b>8</b>
10.	<b>Briefs on changes in provisions for POEM's application through Finance Act</b>	<b>8 &amp; 9</b>
11.	<b>Briefs on shipping business for POEM's application in India</b>	<b>9</b>
12.	<b>Briefs on Income tax provisions for POEM's invocation in India</b>	<b>9</b>
<b>(B) Implications of POEM on companies located outside India but controlled from India</b> <span style="float: right;">10</span>		
13.	<b>Briefs on POEM's application under section 6(3)(ii) of ITA, 1961</b>	<b>10</b>
14.	<b>Briefs on POEM's other provisions under section 115JH of ITA, 1961</b>	<b>10</b>
15.	<b>Briefs on POEM's application through Govt. of India (Govt.)</b>	<b>10</b>
16.	<b>Briefs on POEM's application through transition under section 115JH of ITA, 1961</b>	<b>10 &amp; 11</b>
17.	<b>Briefs on POEM's disallowances of benefits + exemptions by Assessing officer (AO)</b>	<b>11</b>
18.	<b>Briefs on POEM's exceptions + modifications (both) in India</b>	<b>11 to 14</b>

<b>(C) Meanings of words for POEM's application on companies located outside India</b>	<b>15</b>
<b>19. Meaning of Active Business outside India (ABOI) by company located outside India</b>	<b>15</b>
<b>20. Meaning of Incomes of company located outside India</b>	<b>15</b>
<b>21. Meaning of value of assets of company located outside India</b>	<b>15</b>
<b>22. Meaning of number of employees of company located outside India</b>	<b>15 &amp; 16</b>
<b>23. Meaning of Pay Roll of company located outside India</b>	<b>16</b>
<b>24. Meaning of Head Office of company located outside India</b>	<b>16</b>
<b>25. Meaning of Passive Incomes of company located outside India</b>	<b>16</b>
<b>26. Meaning of Senior management of company located outside India</b>	<b>16 &amp; 17</b>
<b>27. Meaning of POEM in India</b>	<b>17</b>
<b>28. Meaning of Determination of POEM of company in India</b>	<b>17</b>
<b>29. Meaning of Period for determination of ABOI of company outside India</b>	<b>18</b>
<b>30. Meaning of Foreign jurisdiction outside India</b>	<b>18</b>
<b>31. Meaning of rate of Foreign exchange for conversion into INR</b>	<b>18</b>
<b>(D) POEM's application in developed countries located outside India</b>	<b>19</b>
<b>32. Briefs on International Jurisprudence for POEM outside India</b>	<b>19</b>
<b>33. Briefs on POEM in United Kingdom (UK)</b>	<b>19</b>
<b>34. Briefs on POEM in Russia</b>	<b>19 &amp; 20</b>
<b>35. Briefs on POEM in Italy</b>	<b>20</b>
<b>36. Briefs on POEM in Mexico</b>	<b>20</b>
<b>37. Briefs on POEM in Germany</b>	<b>20</b>
<b>38. Briefs on POEM in Australia</b>	<b>20</b>
<b>39. Briefs on POEM in Switzerland</b>	<b>20</b>
<b>(E) Guidance's for POEM's application on companies located outside India</b>	<b>21</b>
<b>40. Advantages for POEM's application in India for reducing litigations</b>	<b>21</b>
<b>41. Suggestions for implementation of POEM in India for reducing litigations</b>	<b>21 &amp; 22</b>
<b>Profile of Publisher on 41 FAQs on POEM on co's located outside India</b>	<b>23</b>



## 41 FAQs on POEM on company located outside India but operated from India

### (A) **Briefs on POEM for companies located outside India but controlled from India**

#### 1. **Briefs on introduction for POEM's application in India**

- (i) Our article written specifically in benefits for understanding about residential status of company located outside India but Place of Effective Management (POEM) existed in India during any previous year.
- (ii) POEM in India introduced through Finance Act 2015 + also applicable from assessment year (AY) 2017-18 for previous year ending on March 31<sup>st</sup> 2017 for taxation on company located outside India but POEM existed in India during any previous year (both).
- (iii) POEM in India inserted through section 6(3)(ii) of Income Tax Act (ITA), 1961 under taxation on company located outside India but POEM existed in India during any previous year.
- (iv) POEM Guidelines notified through CBDT's circulars no. 06 + 08 + 25 of 2017 under taxation on company located outside India but POEM existed in India during any previous year.
- (v) (a) POEM Guidelines notified under taxation on company located outside India but POEM existed in India during any previous year for non-clarity against applicability for payment of advance tax + applicability of TDS + etc. (all) in India.  
(b) Finance Act, 2016 deferred for applicability of POEM from April 1<sup>st</sup> 2016 to April 1<sup>st</sup> 2017 (AY 2017-18).  
(c) CBDT clarified through circulars for determination of POEM + also transition mechanism for taxation on company located outside India but POEM existed in India during any previous year (both).



- (vi) *POEM applicable for 12 month like from April 1<sup>st</sup> to March 31<sup>st</sup> when key management + commercial decisions regularly + predominantly being made during whole (100%) year + also during part (not 100%) year (all).*
- (vii) *POEM guidelines from CBDT be clearly define every term like key + effective + key management + commercial decision + senior management + Key Management Personnel's (KMP) (all) to avoid any ambiguity for interpretations in future.*
- (viii) (a) *Application of POEM in India be based on specific facts + also circumstances (both).*
- (b) *POEM guidelines be clearly define factors which to be considered to determine POEM in India + also maximum illustrations be provided for clarity of applicability through CBDT's circulars + notifications + press releases + etc. (all).*

## 2. **Briefs on criteria's for POEM's application in India**

- (i) *When company located outside India but POEM existed in India not engaged in Active Business outside India (ABOI)*
- (ii) *When majority of members of Board of Directors (BODs) residing in India*
- (iii) *When senior management making key management decisions + commercial decisions (both) in India for conducting wholly (100%) + substantially (around 100%) business outside India.*
- (iv) *When place for taking + also implementing (both) key decisions located in India*
- (v) *When global turnover or gross receipts exceeding INR 50 crore during relevant financial year ● notified vide CBDT Circular no. 08 of 2017*

## 3. **Briefs on OECD role's for POEM's application in India**

- (i) *Govt. inserted provisions for treating POEM in India by altering language under section 6(3)(ii) of ITA, 1961 through Finance Act, 2015 based on international practices like guiding principles of OECD*
- (ii) *Interpretation for applicability of POEM in India derived from international practices + also guiding principles of OECD (both).*



- (iii) *OECD's guiding principles treated attempt to interpret for determining POEM's applicability.*
- (iv) *OECD's commentary providing tie-breaker rules for determining residency in India + also residency in 1 more country outside India simultaneously based on place of key management + also commercial decisions (all).*
- (v) *OECD's commentary advising to examine facts + circumstances (both) for determining application of POEM.*
- (vi) *OECD's commentary advising entity when same entity has more than 1 place of management based on effective management.*
- (vii) *OECD's commentary advising various factors for determining application of POEM*
  - (a) *Place where meetings of BoDs or equivalent body of company located outside country being usually held*
  - (b) *Place where chief executive officer (CEO) + also other senior executives (both) being usually carrying business activities*
  - (c) *Place where day-to-day management being carried*
  - (d) *Place where headquarter located*
  - (e) *Place when country's laws governed legal status of company*
  - (f) *Place where accounting records being kept*
  - *However India not applying OECD's interpretation on POEM*

#### 4. *Briefs on important factors for POEM's application in India*

- *Certain important factors for application of POEM in India like:*
- (i) *Place factor*
  - *Place where Senior Management + Key Management Personnel's (KMP) located*
  - (a) *Also meetings of BODs being held*
    - + (plus)*
  - (b) *Also Shareholder's influence existed*



(ii) *Ancillary factor*

- *Place where operational management + Operational commercial decisions (both) being taken*

(iii) *Limited Relevant factors + Irrelevant factors (both) for application of POEM in India*

- (a) *Place of incorporation + governing law treated limited relevance*
- (b) *Place of location of accounting records kept treated limited relevance*
- (c) *Place of location of global advisory committee in India + providing non-binding advisory services treated irrelevant factor*
- (d) *Place of location of support service treated irrelevant factor.*

## 5. *Briefs on Safe harbor provisions for POEM's application in India*

(i) *POEM not to be considered in India when company located outside India but POEM existed in India with minimum base tax rate like 20% + also Income tax department required to allow Foreign Tax Credit (FTC) in India (both).*

(ii) (a) *POEM not to be considered in India when primary assets + employees (both) located outside India.*

*+ (plus)*

(b) *Also POEM not to be considered in India when company already fully active + also fully operative (both) outside India.*

*+ (plus)*

(c) *Also CBDT already allowed through guidelines issued vide circular no. 06 of 2017 where certain criteria's prescribed for minimum % of Passive incomes + assets + employees + expenses on salaries (all) located outside India for treating Active Business outside India (ABOI) + also Income Tax Department (ITD) in India not permitted to apply POEM on company located outside India.*

(iii) *CBDT required to prescribe specific guidelines when POEM be invoked in exceptional cases (only) like invocation of GAAR's provisions in India*

(iv) *CBDT required to allow FTC when POEM already invoked on company located outside India but POEM existed in India*



- (v) CBDT required to prescribe guidelines to avoid double taxation in hands of more than 1 companies when working in multi-layer structure in India.
- (vi) CBDT required to consider existing TP provisions applicable in India.

## 6. **Briefs on issuing guidelines for POEM's application + transfer pricing (TP) principles**

- (i) CBDT required to issue guidelines for not to consider transactions between associate enterprises under POEM in India + also for Indian company under specified domestic transactions (SDT) for Transfer Pricing (TP) principles in India (both).
- (ii) CBDT required to issue guidelines for not to consider transaction between associate enterprises under POEM in India + also with group companies located outside India for application of TP principles in India (both).

## 7. **Briefs on Mutual Agreement Procedure (MAP) for POEM's application in India**

- CBDT required to issue guidelines to undertake tax compliance under ITA, 1961 when company located outside India but POEM existed in India + also be confirmed under MAP through DTAA (treaty)(both).

## 8. **Briefs on POEM's application up to march 31<sup>st</sup> 2016 under section 6(3)(ii) of ITA**

- (i) On company located outside India but POEM existed in India  
+ (plus)
- (ii) On company located outside India but control + management of affairs (both) 100% situated in India

## 9. **Briefs on POEM's application from April 01<sup>st</sup> 2016 under section 6(3)(ii) of ITA**

- (i) On company located outside India but POEM existed in India  
+ (plus)
- (ii) On company located outside India but control + management of affairs (both) wholly (100%) or substantially (near to 100%) situated in India

## 10. **Briefs on changes in provisions for POEM's application through Finance Act**

- (i) POEM existed in India when company located outside India but having effective management of business affairs from India beside holding 1 meeting outside India.



+(plus)

- (ii) Also POEM existed in India when shell company located outside India to avail lower income tax or 0% income tax through residency in tax free (tax heaven) country + territory (both) where company having effective management of business from India.
- (iii) Several cases for tax evasion already observed by IT (revenue) department through Assessing Officers (AO) + also endorsed by ITAT located at Delhi in case of Radha Rani Holdings vs ACIT (2007) 110 TTJ Delhi 920
- (iv) (a) POEM being used by several developed countries for determining residential status + recognized + also accepted by Organization of Economic Cooperation and Development (OECD) (all).  
+(plus)
- (b) Also POEM inserted in Indian tax laws to align with international tax laws.

## 11. **Briefs on shipping business for POEM's application in India**

- (i) POEM originated from ITA, 1961 for taxing shipping companies based on POEM.
- (ii) POEM 1<sup>st</sup> time introduced through Direct Tax Code (DTC) 2010 for determining residential status of companies located outside India but POEM existed in India.

## 12. **Briefs on Income tax provisions for POEM's invocation in India**

- (i) AO required to refer case when POEM already existed in India to Commissioner of Income tax (CIT) thereafter CIT required to refer case to approval panel for obtaining approval before invoking POEM on company located outside India.
- (ii) Process to refer case by AO to CIT thereafter CIT to approval panel for obtaining approval before invoking POEM on company located outside India already similar as prescribed for invoking GAAR's provisions under section 144BA of ITA, 1961.
- (iii) Company located outside India permitted to make its representation before CIT thereafter approval panel (both) against invocation's order for POEM.



## **(B) Implications of POEM on companies located outside India but controlled from India**

### **13. Briefs on POEM's application under section 6(3)(ii) of ITA, 1961**

- (i) *100% global incomes of company located outside India but POEM existed in India liable to Income tax under section 5(1) of ITA, 1961 in India.*
- (ii) *Income tax @ 40% be levied on global incomes of company beside located outside India treated resident of India where income tax being levied @ 22% or @ 25% in India*

### **14. Briefs on POEM's other provisions under section 115JH of ITA, 1961**

- (i) (a) *Income Tax being levied on global income of company in India + outside India + (plus)*
- (b) *Effectively double income tax being levied in India + outside India (both) + (plus)*
- (c) *Company located outside India but POEM existed in India permitted to avail FTC against income tax paid + TDS (both) outside India.*
- (ii) *Govt. of India already inserted section 115JH under ITA, 1961 + also CBDT issued notification no. 28 of 2018 for transition mechanism (both).*

### **15. Briefs on POEM's application through Govt. of India (Govt.)**

- (i) *Govt. empowered to notify conditions for computation of total incomes + treatment of unabsorbed depreciations + set off of losses + carry forward of losses + collection + recovery + special provisions for avoidance of tax + exceptions + modifications + adaptations specified through notifications + circulars for transition mechanism against previous year when POEM not applied in preceding to previous year (all).*
- (ii) *Govt. empowered to notify provisions for transition mechanism when determination of POEM already made during assessment year proceeding for previous year + for other previous year + for succeeding previous year if assessment proceedings completed before end of previous year (all).*

### **16. Briefs on POEM's application through transition under section 115JH of ITA**

- (i) *Transition mechanism under section 115JH of ITA, 1961 permitting benefits + also reliefs under double taxation avoidance provisions of ITA, 1961.*



- (ii) (a) *100% Global Incomes of company located outside India but POEM existed in India to be taxed under section 115JH of ITA, 1961.*  
+ (plus)
- (b) *100% unabsorbed depreciations + carry forward losses of company located outside India in country of incorporation be set off + carried forward (all) in India while computing taxable incomes under ITA, 1961.*  
+ (plus)
- (c) *CBDT issued Notification no. 29 dated June 22, 2018 for modifications + exceptions + adaptations against set offs + carried forwards + transition mechanism (all)*

## 17. **Briefs on POEM's disallowances of benefits + exemptions by Assessing officer (AO)**

- (i) *AO permitted to disallow against already availed benefits + exemptions + reliefs claimed in India by company located outside India + also granted by AO when company failed to comply conditions specified in notification no. 29 dated June 22, 2018 under section 115JH(1)*
- (ii) *AO permitted to disallow abovementioned benefits + exemptions + reliefs + also to recompute taxable incomes under exceptions + modifications + adaptations which not permissible under section 115JH (1) but already claimed by company in India*
- (iii) *AO permitted to rectify assessment order under section 154(7) in 4 assessment year from end of previous year when company failed to comply conditions referred under section 115JH(1) of ITA, 1961.*

## 18. **Briefs on POEM's exceptions + modifications (both) in India**

- (i) *When company already assessed to tax in foreign jurisdiction located outside India*
  - (a) *Company located outside India required to take Written Down Value (WDV) against depreciable asset on 1<sup>st</sup> day of previous year already taken in income tax records in foreign jurisdiction located outside India for computing taxable income in India*  
+ (plus)
  - (b) *Company located outside India required to compute WDV against depreciable asset when WDV on 1<sup>st</sup> day of previous year not already taken in income tax records in foreign jurisdiction located outside India.*



+ (plus)

(c) Company located outside India required to compute WDV for computing taxable incomes in India through working for assets already installed + utilized + also depreciation actually allowed in foreign jurisdiction located outside India (all)

(ii) When company already not assessed to tax in foreign jurisdiction located outside India

- Company located outside India required to take WDV against depreciable asset on 1<sup>st</sup> day of previous year already taken in books of accounts maintained under laws of foreign jurisdiction located outside India for computing taxable incomes in India

(iii) When company already assessed to tax in foreign jurisdiction located outside India

- Company located outside India required to take brought forward losses + unabsorbed depreciations (both) on 1<sup>st</sup> day of previous year already taken in income tax records in foreign jurisdiction located outside India for computing taxable income in India.

(iv) When company already not assessed to tax in foreign jurisdiction located outside India

- Company located outside India permitted to take brought forward losses + unabsorbed depreciations (both) on 1<sup>st</sup> day of previous year which already taken in books of accounts maintained under laws of foreign jurisdiction outside India for computing taxable incomes in India

(v) (a) Company located outside India permitted to take brought forward losses + unabsorbed depreciations (both) on 1<sup>st</sup> day of previous year already computed under para (iii) or (iv) + to allow for remaining period in India  
+ (plus)

(b) Company located outside India not permitted to take brought forward losses + unabsorbed depreciations (both) when incomes of company not chargeable to income tax in India

(vi) Company located outside India required to revise or modify brought forward losses + unabsorbed depreciations (both) referred under para (iii) or (iv) when brought forward losses + unabsorbed depreciations (both) already revised or modified where



due to action from tax authority or legal authority in foreign jurisdiction located outside India.

(vii) (a) Company located outside India required for converting financial statements from 1<sup>st</sup> April to 31<sup>st</sup> March (for 12 month) when financial statements not prepared outside India for same period  
+ (plus)

(b) Company located outside India required for converting financial statements from 1<sup>st</sup> April to 31<sup>st</sup> March (for 12 month) when financial statements prepared from 1<sup>st</sup> January to 31<sup>st</sup> December or 1<sup>st</sup> July to 30<sup>th</sup> June or from 1<sup>st</sup> October to 30<sup>th</sup> September (for 12 month) for preceding to previous year + previous year + succeeding year till POEM applicable on company in India

(viii) Company located outside India required to add (+/plus) 3 month or 9 month in preceding accounting year when preceding accounting year ending on 31<sup>st</sup> December or 30<sup>th</sup> June in preceding to previous accounting year for converting financial statements from 1<sup>st</sup> April to 31<sup>st</sup> March (for 12 month)

(ix) Company located outside India required to allocate on proportionate basis against carry forward losses + unabsorbed depreciations (both) under income tax records in foreign jurisdiction located outside India or books of accounts as case may be outside India.

(x) (a) Company located outside India permitted to apply provisions under Chapter XVII-B of ITA, 1961 beside company liable for income tax under POEM in India.  
+ (plus)

(b) Also provisions under Chapter XVII-B of ITA, 1961 to override provisions applicable under POEM in India.

(xi) (a) Company located outside India permitted to apply provisions under Chapter XVII-B of ITA, 1961 when compliances of provisions already executed before company became resident company under POEM in India.  
+ (plus)

(b) Compliances of provisions under Chapter XVII-B of ITA, 1961 be treated fulfillment of compliances under POEM in India.



(xii) (a) *Company located outside India permitted to apply provisions under section 195(2) of ITA, 1961 when compliances of provisions already executed before company became resident under POEM in India.*  
+ (plus)

(b) *Compliances under section 195(2) of ITA, 1961 be treated fulfillment of compliances under POEM in India*

(xiii) *Company located outside India permitted to avail reliefs + FTC (both) under section 90 or 91 of ITA, 1961*

(xiv) *Company located outside India restricted to avail proportionate FTC when company has offered incomes under ITA, 1961 for more than 1 year*



## (C) **Meanings of words for POEM's application on companies located outside India**

### **19. Meaning of Active Business outside India by company located outside India**

- (i) When *passive incomes outside India exceeding 50% of total global incomes*  
+ (plus)
- (ii) When *assets outside India exceeding 50% of total global assets*  
+ (plus)
- (iii) When *employees outside India exceeding 50% of total global employees*  
+ (plus)
- (iv) When *salary's expenses outside India exceeding 50% of total global salary's expenses*

### **20. Meaning of Incomes of company located outside India**

- (i) *Incomes to include as computed for income tax purpose under laws for country of incorporation of company*  
*or*
- (ii) *Incomes to include as computed for income tax purpose in books of accounts for country of incorporation of company where not requiring computation of incomes for income tax purpose like Income Computation and Disclosure Standards (ICDS) in India.*

### **21. Meaning of value of assets of company located outside India**

- (i) *Average of value of assets at beginning + ending (both) of previous year for tax purpose in country of incorporation of company when assets being depreciable in books of accounts outside India.*  
+ (plus)
- (ii) *Average of value of assets at beginning + ending (both) of previous year for tax purpose in country of incorporation of company when fixed assets being treated block of assets outside India.*
- (iii) *Value of assets be taken which already recorded in books of accounts when assets existed outside India.*

### **22. Meaning of number of employees of company located outside India**

- *Average of employee at beginning + ending of previous year in country of incorporation*



of company + also to include not employed directly like employed on contract basis but performing task similarly to be performed by employed employees (all).

### 23. Meaning of Pay Roll of company located outside India

- To include cost of salaries + wages + bonus + 100% employee's compensations + pensions + also any social cost born by employer (all).

### 24. Meaning of Head Office of company located outside India

- (i) To include place where company's senior management + also their support staff (both) located  
or
- (ii) To include place primarily + predominantly (both) when company having more than 1 locations for maintaining head office.
- (iii) To include place not necessarily same place where majority of employees already working + broadly meeting (both).

### 25. Meaning of Passive Incomes of company located outside India

- (i) To include incomes from transactions when purchases of goods + sales of goods (both) transacted with Associate Enterprises (AEs)  
+ (plus)
- (ii) To include incomes from royalty + dividend + capital gains + interest + also rent (all)  
But
- (iii) Not to include incomes from interest when company located outside India + engaged in business of banking + public financial institution + also activities already regulated by regulatory of country of incorporation in foreign jurisdiction located outside India

### 26. Meaning of Senior management of company located outside India

- To include persons those responsible for developing + formulating key strategies + policies for company + ensuring exhibitions + overseeing executions + implementation of strategies on regular basis + also ongoing basis (all) like:
  - (i) Managing Director (MD) or Chief Executive Officer (CEO)
  - (ii) Financial Director or Chief Financial Officer (CFO)



- (iii) *Chief Operating Officer (COO)*
- (iv) *Head of division + Head of department like Chief Information officer + Technology Officer + Director for Sales + director for Marketing + etc. (all).*

## 27. *Meaning of POEM in India*

- (i) *POEM already defined through CBDT's circular No. 06 dated January 24, 2017 place where key management + commercial decision (both) necessary for conducting business wholly (100%) or substantially (near 100%) located in India.*
- (ii) (a) *POEM be determined each year based on specific facts + circumstances + figures (all).*  
+ (plus)
- (b) *POEM be determined separately for each year*

## 28. *Meaning of Determination of POEM of company in India*

- (i) (a) *POEM applicable when majority meetings of board of directors (BOD's) being held in India*  
+ (plus)
- (b) *POEM applicable when key decisions being taken in India.*  
+ (plus)
- (c) *POEM applicable when abusive + aggressive (both) tax planning's already covered through General Anti Avoidance Rule (GAAR) provisions under section 96 of ITA, 1961 beside POEM not applicable in India*
- (ii) (a) *POEM not applicable when power of taking key decisions not available with BODs beside majority of meetings of BODs being held in India*
- (b) *POEM not applicable when general + objective principles of global policy of group already laid down by parent company in certain fields like payroll functions + accounting functions + Human Resource (HR) functions + IT infrastructure + network platforms + supply chain functions + routine banking operational procedures + other functions beside not specific to entity or group of entities (all).*



**29. Meaning of Period for determination of ABOI of company outside India**

- (i) *Average of 3 Previous Year (PY) be considered for determining of ABOI like Assessment Year (AY) 2023-24 (PY 2022-23) 2019-20 + 2020-21 + 2021-22 = 3 PY*
- (ii) *Average of 1 or 2 PY be considered for determining of ABOI when existence of company 1 or 2 PY (only)*

**30. Meaning of Foreign jurisdiction outside India**

- *Place of incorporation of company located outside India called foreign jurisdiction.*

**31. Meaning of rate of Foreign exchange for conversion into INR**

- *Rate of foreign exchange for converting foreign incomes + FTC (both) for computing into INR.*



## **(D) POEM's application in developed countries located outside India**

### **32. Briefs on International Jurisprudence for POEM outside India**

- (i) Place where actual *top level of management* + *realistic* + *positive management* of *taxpayer or trust taking majority decisions* (all).
- (ii) Place where *effective* + *realistic* + *positive management* (all) *being located*.
- (iii) Place where *any director acting on another person's wishes* + *instructions without considering merit of wishes* + *instructions* + *directions* + also *making decisions* with *possession of limited information's* which required to take any *decision* (all).
- (iv) Place where *economic centre* + *effective centre* (both) of company *being located*.
- (v) Place where *management of daily's business activities* *being carried*.

### **33. Briefs on POEM in United Kingdom (UK)**

- Place where *effective management* like *finance director* + *managing director* + *company's records* + *senior administrative staff* (all) *being located in UK*

### **34. Briefs on POEM in Russia**

- (i) *Main criteria's for determining POEM in Russia*
  - (a) Place where *majority of meeting of board of directors (BODs)* *being held in Russia*
  - (b) Place where *senior management* of company *being regularly acted in Russia*
  - (c) Place where *key corporate officials performing their actual daily's management activities in Russia*.
- *Meaning of Key corporate officials*

*To include persons like in charge of strategic planning + management + also control of company (all) located in Russia*
- (ii) *Auxiliary criteria's for determining POEM in Russia*
  - (a) Place where *preparation of accounting* + also *financial statements* (both) *being made in Russia*
  - (b) Place where *operational personnel management* *being conducted in Russia*



- (c) Place where *books of accounts* + mandatory legal records being *kept in Russia*
- (d) Place where *certain activities like budgeting* + preparing of consolidated financial statements + *adopting of group standards* + also adopting of group policies (*all*) being *carried in Russia*

### 35. *Briefs on POEM in Italy*

- (i) POEM *applicable* where *company located outside Italy having registered office* + also *main business activities (both) being held in Italy* for greater part of financial year like *9 to 12 month* in financial year.
- (ii) POEM *applicable* where *company located outside Italy having place of management + control + exercising relevant influence* + *also satisfying 2 conditions like:*
  - (a) Where *company located outside Italy directly* + also indirectly *controlled by Italian's resident persons* like *company or individual (any)*  
+ *(plus)*
  - (b) Where *company located outside Italy consisting of majority of members of board of directors (BODs) from Italian's resident persons.*

### 36. *Briefs on POEM in Mexico*

- Place where *principal administration of business or POEM being located in Mexico*

### 37. *Briefs on POEM in Germany*

- (i) Place where *registered office or Place of Management (PoM) being located in Germany*
- (ii) Place where *person having final authority to take decisions for management of business being located in Germany*

### 38. *Briefs on POEM in Australia*

- Place where *incorporation + carrying business + central management + control + also voting power (all) being located in Australia*

### 39. *Briefs on POEM in Switzerland*

- Place where *effective management for day to day affairs + meeting of BoDs + also functioning of administration (all) being located in Switzerland*



## (E) **Guidance's for POEM's application on companies located outside India**

### 40. **Advantages for POEM's application in India for reducing litigations**

- (i) POEM perspective for domestic laws + being used important factor for determining residency of company located outside India but being operated from India + also international laws being used for making tie-breaker rules for restricting from dual residency to single residency (all).
- (ii) (a) POEM in India crucial for impacting multinational groups where decisions of foreign entities required to be ratified + also being taken by officials' located in India (both).
  - + (plus)
- (b) Also multinational groups generally have common directors on board of foreign company + also board of Indian company (both) which creating problem of POEM's application in India.
  - + (plus)
- (c) Indian entity required to plan to set up company outside India to undertake adequate tax planning.

### 41. **Suggestions for implementation of POEM in India for reducing litigations**

- (i) Application of POEM impacting negative effect on genuine companies those operating from outside India
- (ii) (a) Although CBDT already issued guidelines on POEM through circular no. 06 + 08 + 25 of 2017 for determining POEM's application based on nature of guiding principles.
- (b) CBDT guidelines on POEM generally vague for many terms used therein. It's suggested that CBDT be rectified guidelines appropriately.
- (c) CBDT guidelines on POEM lacking of definite established legal factors for determining POEM's application which likely to lead tax disputes + also existence of POEM in India already subject matter for litigation in many cases. It's suggested that CBDT be rectified guidelines appropriately.



(iii) (a) *POEM's application be determined based on facts of each case + also activities of company located outside India like wholly (100%) or substantial (near 100%).*

(b) *POEM's application be defined key factors for company located outside India + to examine 100% facts + also circumstances on case to case basis (all).*

(c) *POEM's application be taken into account based on facts + also locations necessary for determining single principal where effective management being located.*

(iv) *POEM's application be considered based on certain key factors like place of meeting of BODs + place of residence of Key Management Personal (KMP) + shareholder's influence in key management + commercial decisions + day to day management + also etc. for examining to guide in determination of POEM in India (all).*



## Published By



**CA. Satish Agarwal**

*B.com (Hons) FCA*

Practicing Chartered Accountant Since 1985

+919811081957

9/14 (First Floor) East Patel Nagar, New Delhi- 110008

Email: [satishagarwal307@yahoo.com](mailto:satishagarwal307@yahoo.com)

Website: [www.femainindia.com](http://www.femainindia.com)

### ◆ **Disclaimer**

1. *Contents of this article are solely for informational purpose. Neither this article nor information's as contained herein constitute a contract or will form basis of contract.*
2. *Material contained in this article does not constitute or substitute professional advice that may be required before acting on any matter.*
3. *While every care has been taken in preparation of this article to ensure its accuracy at time of publication.*
4. *Satish Agarwal assumes no responsibility for any error which despite all precautions may be found herein.*
5. *We shall not be liable for direct, indirect or consequential damage if any arising out of or in any way connected with use of this article or information's as contained herein.*

**July-2023**

