

# Connection

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*People can be really smart or have skills that are directly applicable, but if they don't really believe in it, then they are not going to really work hard.*

*~Mark Zuckerberg*

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**LBA**  
INNOVATE CREATE LEAD

# LALIT BAJAJ & ASSOCIATES

## COMMUNIQUÉ

### JUST TO REMIND YOU

- Nov 15 - e-Payment of PF of October
- Nov 30 - Audit Report u/s 92E and filing of Return where Transfer Pricing applicable
- Nov 30 - Payment and Return of Maharashtra PT
- Nov 30 - Filing of Annual Returns with MCA

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Dear Seniors, Friends & Colleagues,

E =MC<sup>2</sup>

Einstein of simple rules says that if you can not explain properly to others means you have not understood. Same applies to our profession and education system which should help members and students to head towards areas they like or understand properly instead of haywire situation. These will definitely bolster our institute framework as well as improve the members standing in the society as well as to the regulator like in recently whole fraternity was able to get tax audit extension date only at last date of timeline.

It clearly says, fact that it is not necessary that BIG always win now a days its flexibility and adaptation to situation gains more command than big. Like in the case of Nokia and Blackberry which were market leaders only a few years ago and completely vanished now. So it clearly says that change with system is must which fosters that there should be more continuous learning programs for members and education system should be more dynamic to the global tune and demand

Besides, one of the most important composition of our population is woman's and in the era of women empowerment where some of big organization like Pepsi, ICICI Bank and Axis Bank etc are headed by females. As an Institute we should take pride in encouraging female members and their active participation in Institute as well as in industry especially after their marriage where they play dual role.

Its time to put our words into actions as it is rightly said that person who awaits long is left only with salvage of successful people.

In light of the above we solicit your strong support in favour of CA Lalit Bajaj (Sr. No. 9 on Ballot Paper) contesting the forthcoming Elections of Western India Regional Council to be held on 4<sup>th</sup> and 5<sup>th</sup> of December, 2015. By selecting him as your representative you can ensure that a he can always be your voice to protect and build the image of CA profession. Thus we request you to kindly support him in his endeavour by casting your 1<sup>st</sup> Preference Vote.

Wishing you a Very Happy Diwali & a Prosperous New Year!!

Best Wishes

Team **Connection**

## PLACE OF EFFECTIVE MANAGEMENT (POEM)

The Finance Act 2015 has introduced a major change to the definition of residential status of companies vide amendment to Section 6(3) of the Income Tax Act, 1961 ('Act') which is likely to have significant impact with respect to foreign companies.

A foreign company, which was previously considered as resident if 'control and management of its affairs is wholly situated in India during the year', is now to be considered as resident if 'its place of effective management (POEM), at any time during the year, is in India'.

POEM has been defined as "a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance, made", in line with definition appearing in Commentary to Organization for Economic Co-operation and Development ('OECD') Model Tax Convention. This article attempts to analyse the definition of POEM and the criteria that could be relevant in determination of POEM in light of the concepts adopted internationally.

### Evolution of POEM in Indian context

Prior to the amendment, foreign companies were considered as tax resident in India if during and throughout the year under consideration, their control and management was "wholly" situ-

ated in India. Accordingly, if control and management of a foreign company was even partly situated outside India, it was regarded as non-resident.

The definition of residence was thus considered as too high a threshold compared to the definition of residence in tax treaties. Therefore, a need to revise the same was envisaged under the DTC and accordingly the concept of POEM for determination of residential status was introduced in Direct Taxes Code Bill (DTC) released on 15 June 2010. The principle survived with modifications in DTC revised draft circulated in 2013.

Recognizing that, the requirement of "whole" of control and management in India for the entire year as criteria to determine residential status was a very restricted definition and avoidance of residence became easy by even holding a single board meeting outside India, the Finance Bill 2015 proposed the amendment. With a view to align provisions of the Act with DTAA's and other international standards and prevent avoidance of tax by shell or conduit companies incorporated outside India, the concept of POEM was introduced under the Act.

### Background of POEM in International context

Most countries determine residential status of a com-

pany based on criteria such as place of incorporation / registration, place of management / principal place of management / place of management and control / location of central management and control / POEM.

POEM as one of the criteria for determination of residential status of foreign companies is incorporated in domestic laws of various countries including South Africa, China, Italy, Denmark, Netherlands, Switzerland, Greece, Slovenia and Korea. Though, none of these consider a foreign company as a resident if its POEM "at any time during the year" is in that country, except Greece.

OECD, in its commentary on Article 4 of the Model Tax Convention on Income and Capital recognizes POEM as an internationally recognized concept as a tie breaker rule for determining residential status. OECD observes that all relevant facts and circumstances must be examined to determine POEM. OECD suggests that in determining POEM, various factors should be taken into account including factors such as where the board meeting are usually held; where the chief executive officer and other senior executives usually carry on their activities; where the senior day-to-day management of the person is usually carried on; where the person's headquarters are lo-



*"POEM is one of the criteria for determination of Residential Status of Foreign Companies"*





cated; which country's law govern the legal status of the person; where its accounting records are kept; whether determining that the legal person is a resident of one of the contracting states but not of the other would carry the risk of an improper use of the Convention.

The 2014 report of OECD on Base Erosion and Profit Shifting (BEPS) Action Point 6 on preventing the granting on treaty benefits in inappropriate circumstances mentions that initially, it was considered that it would not be an adequate solution to attach importance to a purely formal criterion like registration and preference was given to a rule based on the POEM, which was intended to be based on the place where the company is actually managed. However, in 2014, the Committee on Fiscal Affairs recognized that there had been a number of tax avoidance cases involving dual resident companies.

The BEPS report therefore concluded that a better solution to the issue of dual residence of entities was to deal with such situations on a case-by-case basis instead of having POEM as test. Dealing with dual residence cases on basis of facts and circumstances of the case is thus preferred over POEM test. Further, countries considering POEM as preferable to deal with dual residency cases need to ensure that these provisions are not abused.

The concept of POEM also appears in

most of the tax treaties for determining taxability of shipping and airline entities and also as a tie breaker rule under Article for residence.

### The Concept of POEM

While the concept of POEM appears in domestic laws of various countries and is used in many tax treaties as a tie breaker rule and also in determining taxability of companies engaged in shipping and aircraft business, the phrase has multiple interpretations across different countries. The term POEM has no universal meaning.

There are primarily two tests that are applied when determining the location of an entity's POEM, i.e. the place where the board of directors meets (also referred to as the "**board-centric**" or "**Anglo-American**" approach) or the place where the senior management of the company operate (also referred to as "**Continental**" approach).

In this context, reference can be drawn from Interpretation Note 6 on POEM issued by South Africa, which details that place can be distinguished into three categories based on level of management –

Top level management – The place where central management and control is carried out by a board of directors;

Executive / Mid-level Management – The place where executive directors or senior management execute and implement the policy and strategic decisions made by the board of directors and make and implement day to day/regular! operational management and business activities;

Operational level Management – The place where the day to day business activities are carried out / conducted.

Under the Board-centric approach, POEM is determined based on place

where board of directors meet, whereas, under the continental approach, place where the senior management of the company operates is preferred in determination of POEM.

As per the amendment, POEM has been defined as 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**". The definition can be interpreted through the following key words.

### Key management and commercial decisions

It appears that the definition focuses on management alone. The word "control" appearing in the earlier provisions of the Act is missing from the amended definition. Thus it may be possible to take a view that location of shareholders or shareholder meetings or the place where the control of the entity exists may not be relevant in determination of POEM.

Further, focus is on key decisions relating to management and commercial aspects of the entity. Thus, the day-to-day operations may not be significant as the same may not form part of the "key" decisions.

### Necessary for the conduct of the business

It appears that the definition is inclined towards a continental approach as focus is on 'management and commercial decisions for the conduct of the business'. Thus, it is tilted to focus on the executive level management decisions which involve decision making for overall conduct of the business in line with the broad strategies and



policies formulated by the board of directors.

#### Of an entity as a whole

This phrase indicates that isolated day-to-day operations may not be relevant in determination of POEM. POEM would be determined based on overall decision making for conduct of business of the entity as a whole. This also indicates that third level of management i.e. operational management may not be relevant in determining POEM.

#### In substance made

POEM would be determined based on the principle of "Substance over form". Thus, in line with the intention to cover shell companies under this provision, it appears that substance would be given emphasis before determining POEM. Accordingly, it may be possible that even though the board meetings are conducted in and minutes are signed in Country X, but decisions are in substance taken in Country Y, Country Y be considered as POEM.

**DTC 2010 defined POEM** for determination of residential status, as –

the place where the board of directors of the company or its executive directors, as the case may be, make their decisions; or

in a case where the board of directors routinely approve the commercial and strategic decisions made by the executive directors or officers of the company, the place

where such executive directors or officers of the company perform their functions.

However, the Standing Committee on Finance, in its report on DTC 2010, observed that the reference to Executive Directors (ED) in the POEM definition led to ambiguity, as the term was not defined either in the DTC or in the Companies Act, 1956. Further, inclusion of "officer" in the second limb of the definition could increase uncertainty, as commercial and strategic decision making is spread at various levels in modern day organizations. Further, the Committee recommended that "determining POEM on the basis as to where such officers perform their functions was not an objective criteria of deciding fiscal residency". The Committee, therefore, recommended that the definition of POEM should be amended, by removing reference to ED or officer. The Committee advised that the residency should be determined on the basis of internationally accepted standards and judicially settled principles, where the 'focus is on the place, where the key management and commercial decisions as a whole are made or where the "head and brain" of the company is situated'. The definition of POEM was thus modified in line with OECD Commentary based on recommendations of the Committee.

This also indicates that the proposed law does not intend

to determine POEM based on place where the day-to-day functions are performed or executed by the officers of the Company but based on the place where key management and commercial decisions are taken.

In light of the above analysis, it appears that the India would align with continental approach and location of mid-level of management may be considered for identifying POEM. However, there is no clarity as yet and different interpretations are possible to the current definition. It may also be possible to interpret that location of both top as well as mid-level management would be relevant. The memorandum to the Finance Bill 2015 acknowledges that POEM is a fact dependant exercise and also proposes to prescribe guiding principles for determination of POEM.

Since India borrows definition of POEM from OECD, it may also be relevant to note that previously, OECD 2000 Model defined POEM as "POEM is the place where key management and commercial decisions that are necessary for the conduct of the business of the entity's business are in substance made. The POEM will ordinarily be the place 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 entity as a whole are determined; however, no



*"India borrows  
definition of  
POEM from  
OECD"*





definitive rule can be given.” However, the reference to Board of directors appearing in OECD 2000 was deleted in OECD 2008. The definition is now open to different levels of management.

Internationally, POEM is interpreted differently by different countries. South Africa follows a Continental approach and considers that the concept of effective management is not the same as shareholder control or control by the board of directors. Amongst above, South Africa considers POEM based on the second level management i.e. the place where the company is managed on a regular or day to day basis by the directors or senior managers of the company, irrespective of where the overriding control is exercised, or where the board of directors meets. It thus identifies POEM based on location of senior officers or executives who are responsible for (i) actually developing or formulating key operational or commercial strategies and policies for, or taking decisions on key operational or commercial actions by the company and (ii) ensuring that those strategies and policies are carried out. South Africa also provides for further tie breakers in case management functions may be executed in multiple locations. Further, certain highly taxed Controlled Foreign Corporations (CFCs) are excluded from being considered

as resident based on POEM.

In Russia, POEM is governed by its domestic laws and POEM is considered to be in Russia if any of the following conditions is fulfilled –

Majority of meetings of BOD (or a similar body of the company other than an executive body) are held in Russia, wherein, majority means meetings held in Russia exceed meetings held in any other country.

Executive body regularly carries on its activities in relation to that organization from Russia. Activities, are however, deemed not to be carried on regularly in Russia if activities are carried on in Russia to a substantially lesser extent than in other states.

CEO primarily carry out their activities in the form of executive management in Russia

Russia thus looks at BOD meetings, management functions and activities of main executive personnel, subject to various additional conditions.

China defines effective management as substantial and overall management and control over manufacturing and business operations, human resources, accounting, properties, etc. of the entity.

France, in its observations to OECD commentary, mentions that it interpret POEM as ‘the place where the person or group of persons who exercises the most senior functions (for example a board of directors or management board) makes its key management and commercial decisions, the place where the organs of direction, management and control of the entity are, in fact, mainly located.’

Hungary is of the opinion that in determining the POEM, one should also take into account the place where the chief executive officer and other senior executives usually carry on their activities as well as the place where

the senior day-to-day management of the enterprise is usually carried on.

### Impact of the amendment

The intention of the amendment seems to be to prevent avoidance of taxes by shell companies incorporated outside India and controlled and managed from India. However, the specific guidelines explaining the meaning of the phrase are still awaited.

The amendment proposed under the Finance Bill 2015, included the words “at any time” and proposed to consider a company having its POEM at any time during the year in India to be a resident of India. This had widened the scope of taxation probably even beyond what was comprehended by the Finance Minister. The phrase “at any time” had created complexities and questions arose as to whether even a single commercial and strategic decision approved in India or a single board meeting conducted in India could tantamount to the POEM (for the purpose of determining tax residency) being in India. This was a concern more specifically in case of outbound investments of Indian persons, wherein most of the directors and shareholders would be Indian persons.

Apart from foreign subsidiaries of Indian companies, even in case of Foreign companies, questions arose as to whether a board meeting held by a Foreign Holding Company in India to formulate India Business Strategy along-with its Indian subsidiary, could



also be considered as POEM in India? This could have serious consequences, including taxation of world-wide income of the foreign company considered as resident in India. There could also be cases where Indian persons are on the board of overseas entities, due to their skill and expertise. Considering such foreign companies as resident and taxing it on its world-wide income if its POEM is in India at any time, would have also discouraged appointment of Indian directors as board members of such MNCs. Considering the concerns raised, the Finance Act 2015 as enacted did not include the phrase “at any time”.

Though removal of the words “at any time” did reduce the complexities, in absence of clear guidelines for determination of POEM, ambiguity still remains. The proposed amendment would have severe implications for multinational companies having board members across different countries. With growing importance of digital economy, there could be numerous cases where decisions are over video conferences. Issues arise as to whether participation in meetings through conference calls or circular resolutions could also lead to an exposure of having POEM in India. Indian persons being executive directors of foreign companies may need to ensure that they do not take any decision while they visit India.

Also, a company may become

resident of two countries, if it has its place of effective management at any time during the year in two countries. The provisions of the DTAA generally do not incorporate provisions like Tie Breaker Rule to deal such a situation of dual residency due to POEM in both the countries in case of a company. Further, various DTAA do not have tie breaker rules for companies which are residents of both the contracting states. For instance as per the DTAA between India and USA, if a company is a resident of both India and USA, it will not be eligible to tax treaty benefits. Accordingly, the amendment in the definition of the residence may lead to double taxation in case of foreign companies, except in cases like India-China DTAA, where as per the tie breaker rule, company will be resident of the contracting state in which its head office is situated.

It seems that POEM intends to be the place where key decisions “for the business as a whole” are made “in substance” and importance would be attached to the substance, however, the current law requires clarity and certainty. The existence of POEM should be determined based on facts and circumstances. Factors determining POEM should be incorporated in the law, which could include:

Location of the centre of top level management personnel;

The scale of and a compara-

tive analysis of onshore as opposed to offshore operations;

Place of residence of the directors or senior personnel, who are responsible for the overall management;

The frequency and location of the meetings of the entity’s directors or senior personnel;

The experience and skills of the directors or managers who purport to manage the entity;

The actual activities and physical location of senior employees; etc.

Let us hope that the guiding principles proposed to be framed and introduced would bring more clarity, set some time threshold as well as carve exceptions for genuine operating companies and the provisions would be set in line with the intention to penalize only the shell companies and not create hardships for operating companies.



## PROPOSED GST RETURN - SALIENT FEATURES

The Joint Committee constituted in consultation with Government of India, for looking into Business Processes for Goods and Service Tax (GST) has submitted its Report on GST Return. The salient features proposed in relation to GST Return are as follows:

1. There will be common E-Return for CGST, SGST, IGST and Additional Tax.
2. Every registered person is required to file a return for the prescribed tax period. Return needs to be filed even if there is no business activity (i.e. Nil Return) during the said tax period of return.

The exception to this will be UN agencies etc. which shall be required to file return only for the month during which they make purchases rather than regular returns.

Also government entities/PSU's etc. not dealing in GST supplies or persons exclusively dealing in exempted / Nil rated / non -GST goods or services would neither be required to obtain registration nor required to file returns under the GST law.

3. Periodicity of Filing returns:

Different periodicity for filing of return for different categories of taxpayers, after payment of tax due. The return can be filed without payment of self-assessed tax as per the return but such return

would be treated as an invalid return.

Returns for different categories of taxpayers and its periodicity is as follows:

**GSTR 1** - Monthly return for Outward supplies made by taxpayer (other than compounding taxpayer and ISD)

**GSTR 2** - Monthly return for Inward supplies received by a taxpayer (other than a compounding taxpayer and ISD)

**GSTR 3** - Monthly return (other than compounding taxpayer and ISD) (consolidated return based on the above two returns)

**GSTR 4** - Quarterly return for compounding Taxpayer

**GSTR 5** - Periodic return by Non-Resident Foreign Taxpayer

**GSTR 6** - Return for Input Service Distributor (ISD)

**GSTR 7** - Return for Tax Deducted at Source

**GSTR 8** - Annual Return

Normal / Regular taxpayers with multiple registrations (for business verticals) within a State would have to file GSTR-1, GSTR-2 and GSTR-3 for each of the registrations separately.

4. Monthly Returns -

4.1 Major Components of GSTR 1 -

Final invoice-level supply information pertaining to the tax period separately for

goods and services:

For all B2B supplies (whether inter-state or intra-state), *invoice level specified details* will be uploaded.

For all inter-state B2C supplies (including to non-registered Government entities, Consumer / person dealing in exempted / NIL rated / non GST goods or services), the suppliers will upload invoice level details in respect of every invoice whose value is more than Rs. 2,50,000/-.

For invoices below Rs.2,50,000/-, State-wise summary of supply statement will be filed covering those invoices where there is address on record. (The address of the buyer has to be mandatorily reflected in every invoice having a value of Rs. 50,000/- or more. Invoices for a value less than Rs. 50,000/- that do not have address on record will be treated as intra-state supply.)

For all Intra-State B2C supplies (including to non-registered Government entities, consumer / person dealing in exempted / NIL rated / non GST goods or services), consolidated sales (supply) details will be uploaded.

There will be a separate table for submitting the details of revisions in relation to the outward supply invoices pertaining to previous tax periods.





There will be a separate table for effecting modifications/correcting errors in the returns submitted earlier.

#### 4.2 Major Components of GSTR 2 -

Final invoice-level inward supply information pertaining to the tax period for goods and services separately

The information submitted in GSTR-1 by the Counterparty Supplier of the taxpayer will be auto populated in the concerned tables of GSTR-2. It may be modified i.e. added or deleted by the Taxpayer while filing the GSTR-2. The recipient would be permitted to add invoices (not uploaded by the counterparty supplier) if he is in possession of invoices and have received the goods or services.

Auto Population in GSTR-2 from GSTR-1 will be done on or after 11th of the succeeding month. Addition or Deletion of the invoice by the taxpayer will be permitted between 12th and 15th of the succeeding month.

#### 4.3 Major Components of GSTR 3 -

Turnover Details including Gross Turnover, Export Turnover, Exempted Domestic Turnover, Nil Rated Domestic Turnover, Non GST Turnover and Net Taxable Turnover.

Final aggregate level outward and inward supply information. These details will be auto populated from GSTR-1 and GSTR-2.

Excess payment, if any, will be carried forward to the next return period. The taxpayer will also have the option of claiming refund of excess payment through the return for which appropriate field will be provided in the return form.

#### 4.4 Major Components of GSTR 6 -

Final invoice-level inward supply information pertaining to the tax period separately for goods and services on which the ITC is being claimed. It will be auto populated on the basis of GSTR-1 filed by the Counterparty Sup-

plier of the taxpayer. The same may be modified i.e. added or deleted by the Taxpayer while filing the ISD return.

#### 4.5 Major Components of GSTR 7 -

Details of GSTIN of the Supplier along with the invoices against which the Tax has been deducted.

#### 5. Annual Return - Major Components of GSTR 8 -

It will be filed by all normal/regular taxpayers. It would provide a reconciliation of the returns with the audited financial statements of the taxpayer.

This return is to be submitted along with the audited copies of the Annual Accounts of the dealer and would be filed by 31<sup>st</sup> December following the end of the financial year for which it is filed. A separate reconciliation statement, duly certified by a Chartered Accountant, will have to be filed by those taxpayers who are required to get their accounts audited under section 44AB of Income Tax Act 1961. Currently this limit is Rs 1 Crore.

6. Invoice Level information to be captured in the return has been specified. For example in case of invoices pertaining to B2B transactions (for both supply and purchase) GSTIN, Invoice number, date, value, HSN Code, Taxable value, tax rate, tax amounts, place of supply (state), etc. needs to be filled.

#### 7. Revision of Returns -

There would be no revision of returns. All unreported invoices of previous tax period would be reflected in the return for the month in which they are proposed to be included. The interest, if applicable will be auto populated.

#### 8. Non-Filers and Late Filers -

In case of failure by the taxpayer to submit periodic returns, a defaulter list will be generated by the IT system by comparing the return filers with the registrant database. Such defaulter list will be provided to the respective

GST Authorities for necessary enforcement and follow up action.

#### 9. Acknowledgment of Return -

On submission of return, an Acknowledgement Number will be generated. However, if it is filed offline first a transaction ID will be generated and then sometime later acknowledgment of receipt of return will be generated.

#### 10. Processing of Return -

Once a return is acknowledged, forward that GST Return to tax authorities of Central and appropriate State Govt. through the established IT interface.

The ITC claim will be confirmed to purchasing taxpayer in case of matched invoices after 20th of the month succeeding the month of the tax period month provided counterparty supplying taxpayer has submitted the valid return (and paid self-assessed tax as per return).

Auto - populate the ITC reversals due to mismatching of invoices in the taxpayer's account in the return for the 2nd month after filing of return for a particular month.

Communicate to the taxpayers through SMS/e-Mail, about the macro-results of the matching. The details will be in the taxpayers' dashboard/ledger which can be viewed after log-in at the Portal.

To sum up, the mechanism of return filing is integrated real time from the point of view of supplier and receiver. The whole process is technology driven which presupposes setting up of flawless IT infrastructure which seems a big challenge.



## SUMMARY RECTIFICATION OF BANKRUPTCY LAW REFORM COMMITTEE (BLRC)



The Report of the BLRC is in two parts:

- i. Rationale and Design/Recommendations;
- ii. A comprehensive draft Insolvency and Bankruptcy Bill covering all entities.

The draft Bill has consolidated the existing laws relating to insolvency of companies, limited liability entities (including limited liability partnerships and other entities with limited liability), unlimited liability partnerships and individuals which are presently scattered in a number of legislations, into a single legislation. The committee has observed that the enactment of the proposed Bill will provide greater clarity in the law and facilitate the application of consistent and coherent provisions to different stakeholders affected by business failure or inability to pay debt and will address the challenges being faced at present for swift and effective bankruptcy resolution. The Bill seeks to improve the handling of conflicts between creditors and debtors, avoid destruction of value, distinguish malfeasance vis-a-vis business failure and clearly allocate losses in macroeconomic downturns.

The **major recommendations** of the Report are as follows:

**i. Insolvency Regulator:** The Bill proposes to establish an Insolvency Regulator to exercise regulatory oversight over insolvency professionals, insol-

vency professional agencies and informational utilities.

**ii. Insolvency Adjudicating Authority:** The Adjudicating Authority will have the jurisdiction to hear and dispose of cases by or against the debtor.

- a. **The Debt Recovery Tribunal (“DRT”)** shall be the Adjudicating Authority with jurisdiction over individuals and unlimited liability partnership firms. Appeals from the order of DRT shall lie to the Debt Recovery Appellate Tribunal (“DRAT”).
- b. The National Company Law Tribunal (“NCLT”) shall be the Adjudicating Authority with jurisdiction over companies, limited liability entities. Appeals from the order of NCLT shall lie to the National Company Law Appellate Tribunal (“NCLAT”).
- c. NCLAT shall be the appellate authority to hear appeals arising out of the orders passed by the Regulator in respect of insolvency professionals or information utilities.

**iii. Insolvency Professionals:** The draft Bill proposes to regulate insolvency professionals and insolvency professional agencies. Under Regulator’s oversight, these agencies will develop professional standards, codes of ethics and exercise a disciplinary role over errant members leading to the development of a competitive industry for insolvency professionals.

**iv. Insolvency Information Utilities:** The draft Bill proposes for information utilities which would collect, collate, authenticate and disseminate financial information from listed companies and financial and operational creditors of companies. An individual insolvency

database is also proposed to be set up with the goal of providing information on insolvency status of individuals.

**v. Bankruptcy and Insolvency Processes for Companies and Limited Liability Entities:** The draft Bill proposes to revamp the revival/re-organisation regime applicable to financially distressed companies and limited liability entities; and the insolvency related liquidation regime applicable to companies and limited liability entities.

a. The draft Bill lays down a clear, coherent and speedy process for early identification of financial distress and revival of the companies and limited liability entities if the underlying business is found to be viable.

b. The draft Bill prescribes a swift process and timeline of 180 days for dealing with applications for insolvency resolution. This can be extended for 90 days by the Adjudicating Authority only in exceptional cases. During insolvency resolution period (of 180/270 days), the management of the debtor is placed in the hands of an interim resolution professional/resolution professional.

c. An insolvency resolution plan prepared by the resolution professional has to be approved by a majority of 75% of voting share of the financial creditors. Once the plan is approved, it would require sanction of the Adjudicating Authority. If an insolvency resolution plan is rejected, the Adjudicating Authority will make an order for the liquidation.

d. The draft Bill also provides for a fast track insol-



veny resolution process which may be applicable to certain categories of entities. In such a case, the insolvency resolution process has to be completed within a period of 90 days from the trigger date. However, on request from the resolution professional based on the resolution passed by the committee of creditors, a one-time extension of 45 days can be granted by the Adjudicating Authority. The order of priorities [waterfall] in which the proceeds from the realisation of the assets of the entity are to be distributed to its creditors is also provided for.

**vi. Bankruptcy and Insolvency Processes for Individuals and Unlimited Liability Partnerships:** The draft Bill also proposes an insolvency regime for individuals and unlimited liability partnerships also. As a precursor to a bankruptcy process, the draft Bill envisages two distinct processes under this Part, namely, Fresh Start and Insolvency Resolution.

a. In the Fresh Start process, indigent individuals with income and assets lesser than specified thresholds (annual gross income does not exceed Rs. 60,000 and aggregate value of assets does not exceed Rs.20,000) shall be eligible to apply for a discharge from their “qualifying debts” (i.e. debts which are liquidated, unsecured and not excluded debts and up to Rs.35,000). The resolution professional will investigate and prepare a final list of all

qualifying debts within 180 days from the date of application. On the expiry of this period, the Adjudicating Authority will pass an order on discharging of the debtor from the qualifying debts and accord an opportunity to the debtor to start afresh, financially.

b. In the Insolvency Resolution Process, the creditors and the debtor will engage in negotiations to arrive at an agreeable repayment plan for composition of the debts and affairs of the debtor, supervised by a resolution professional.

c. The bankruptcy of an individual can be initiated only after the failure of the resolution process. The bankruptcy trustee is responsible for administration of the estate of the bankrupt and for distribution of the proceeds on the basis of the priority.

**vii. Transition Provision:** The draft Bill lays down a transition provision during which the Central Government shall exercise all the powers of the Regulator till the time the Regulator is established. This transition provision will enable quick starting of the process on the ground without waiting for the proposed institutional structure to develop.

**viii. Transfer of proceedings:** Any proceeding pending before the AAIFR or the BIFR under the SICA, 1985, immediately before the commencement of this law shall stand abated. However, a company in respect of which

such proceeding stands abated may make a reference to Adjudicating Authority within 180 days from the commencement of this law



## FAQ ON DELISTING OF EQUITY SHARES



*These FAQs offer only a simplistic explanation/clarification of terms/concepts related to the SEBI (Delisting of Equity Shares) Regulations, 2009 ["Delisting Regulations, 2009"]. Any such explanation/clarification that is provided herein should not be regarded as an interpretation of law nor be treated as a binding opinion/guidance from the Securities and Exchange Board of India ["SEBI"]. For full particulars of laws governing the substantial acquisition of shares and takeovers, please refer to actual text of the Acts/Regulations/Circulars appearing under the Legal Framework Section on the SEBI website.*

### **1. What is meant by delisting of securities?**

The term "delisting" of securities means removal of securities of a listed company from a stock exchange. As a consequence of delisting, the securities of that company would no longer be traded at that stock exchange.

### **2. What is the difference between voluntary delisting and compulsory delisting?**

In voluntary delisting, a company decides on its own to remove its securities from a stock exchange whereas in compulsory delisting, the securities of a company are removed from a stock exchange as a penal measure for not

making submissions/complying with various requirements set out in the Listing agreement within the time frames prescribed

### **3. What is the exit opportunity available for investors in case a company gets delisted?**

SEBI (Delisting of Securities) Regulations, 2009 provide an exit mechanism to the existing shareholders in the following manner:

Voluntary delisting whereby the exit price is determined through the Reverse Book Building process-The floor price is calculated in accordance with the regulations and the shareholders have to make a bid at a price either on or above the floor price. The exit price would be decided on the basis of bidding by the public shareholders. If the exit price so determined is acceptable to the promoter, the promoter pays that price to the investors and the investors can exit.

Those investors who do not participate in the Reverse Book Building process have an option to offer their shares for sale to the promoters. The promoters are under an obligation to accept the shares at the same exit price. This facility is usually available for a period of at least one year from the date of closure of the delisting process.

Voluntary Delisting for a small company- Any company with paid up capital of less than Rs. ten crore and net worth less than Rs. twenty five crores, whose equity shares have not been traded in any recognized stock exchange for a period of one year and has not been suspended for any non-compliance in the preceding one year would not be required to follow the Reverse Book Building process. In such cases, the promoter decides the exit price in consultation with the mer-

chant banker. The promoter writes to all public shareholders informing the proposal for delisting. Once the requisite consent is received, the promoter makes payment of consideration for the same and the shareholders can exit.

### **4. Whether a company listed on more than one stock exchange has to provide exit offer to shareholders in case it delists from one stock exchange but remains listed on the other stock exchange?**

A company which delists its equity shares from a recognised stock exchange but continues to remain listed on another recognised stock exchange would not be required to provide an exit opportunity to its shareholders provided the equity shares remain listed on any recognised stock exchange which has nationwide trading terminals.

### **5. Whether the same merchant banker appointed to carry out due-diligence on behalf of the company in terms of Regulation 8(1A) of Delisting Regulations can act as a Manager to the offer?**

Yes, the same merchant banker can conduct due-diligence on behalf of the company and also act as the Manager to the Delisting Offer.

### **6. What is the reference date for calculation of floor price under the delisting Regulations?**

The reference date for computing the floor price would be the date on which



the recognized stock exchanges were notified of the board meeting in which the delisting proposal would be considered

**7. What would constitute demonstration of delivering the letter of offer to all the public shareholders in terms of the proviso to regulation 17(b) of Delisting Regulations in cases where atleast 25% of the public shareholders do not participate in the book building process?**

In this regard, it is clarified as under:

a. If the acquirer or the Merchant Banker sends the letter of offer to all the shareholders by registered post or speed post through India Post and is able to provide a detailed account regarding the status of delivery of the letters of offer (whether delivered or not) sent through India Post, the same would be considered as a deemed compliance with the proviso to regulation 17(b) of the Delisting Regulations.

b. If the Acquirer and Merchant Banker are unable to deliver the letter of offer to

certain shareholders by modes other than speed post or registered post of India Post, efforts should be made to deliver the letter of offer to them by speed post or registered post of India Post. In that case, a detailed account regarding the status of delivery of letter of offer (whether delivered or not) provided from India Post would also be considered as deemed compliance with the proviso to regulation 17(b) of the Delisting Regulations.

**8. In case any third party acquirer makes a delisting offer instead of an open offer under regulation 5A of SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011, whether the requirement of Board approval and MB due diligence would apply?**

Yes, the requirement of Board approval and due diligence by the Merchant Banker would apply in such cases as well.

**9. Can cash component of the escrow account in the delisting offer process be maintained in an interest bearing account?**

Yes, the cash component of the escrow account may be maintained in an interest bearing account. However, the merchant banker shall ensure that the funds are available at the time of making payment to shareholders.



**M C A E X T E N D S L A S T D A T E O F F I L I N G**

In continuation of this Ministry's General Circular No. 10/2015 dated 13.07.2015, keeping in view the request received from various stakeholders, it has been decided to relax the additional fee payable on forms AOC-4 and AOC-4 XBRI upto 30<sup>th</sup> No-

vember, 2015, The additional fee requirement for MGT-7 E-Form is also relaxed for all such forms filed till 30<sup>th</sup> November, 2015, wherever additional fee is applicable.



**CBDT TO INITIATE PAPERLESS SCRUTINY ASSESSMENT**



In order to improve the taxpayer services, enhance the efficiency and to usher in a paperless environment for carrying out the assessment proceedings, CBDT has decided to initiate the concept of using email for corresponding with taxpayers and sending through emails the questionnaires, notice etc. at the time of scrutiny proceedings and getting responses from them using the same medium on a pilot basis. This would eliminate the necessity of visiting the Income-tax Offices by the taxpayers, particularly in

smaller cases, involving limited issues and where taxpayer is able to provide details required by the AO without necessitating his physical presence.

Steps are being taken by CBDT to devise suitable mechanism for setting up a standardized platform for making such email based communications between the taxpayer and the Income-tax Department seamless and user friendly. To start with, it has been decided to launch a pilot project in this regard in five non-corporate charges at Delhi, Mumbai, Bengaluru, Ahmedabad & Chennai stations. Initially, 100 cases for e-hearing could be identified in each of these charges and major part of assessment processing should be conducted in electronic mode. Also, the cases covered under the aforesaid pilot project should be those which have been selected for scrutiny on the basis of AIR/CIB information or non-

matching with 26AS-data. Consent of taxpayers should also be obtained in the beginning and cases of only willing taxpayers be considered under the pilot project. The officers of the Department, through their official e-mail IDs, can interact with the taxpayers at their e-mail IDs as mentioned in the respective returns of income.

Board desires that necessary steps may accordingly be taken for initiating the pilot project on top priority.



**E - C O M M E R C E T A X A T I O N**

*E-commerce occurs in various forms and between various entities in the market. One among the question faced by nations is how to tax it. As the internet crosses the boundaries the main challenges are how can the basic requirements of physical presence and substantial nexus criteria of taxation can be met. The article tries to analyse the key issues in the area of e-commerce taxation. Article alarms the nation that if it is left untaxed it will give rise to a parallel economy.*

**INTRODUCTION**

There has been so much

euphoria with regard to Indian E-commerce story and is on track to become the world's fastest growing e-commerce market. This growth story is being driven by robust investment activity by VCs, Angels and the rapid increase in internet users. Internet users in India have gone up from 50 million in 2007 to 300 million in 2014. As per Morgan Stanley, size of the Indian internet market is expected to rise from \$11 billion in 2013 to \$137 billion by 2020 and market capitalization of these internet businesses could touch \$160-200 billion from

the \$4 billion at present. Let's understand various e-commerce models from the indirect Tax perspective:-

**SUPPLY OF GOODS**

E-commerce Platforms have entered into Memorandum of Understanding with seller to promote the business of seller. This type of business has several models and service tax to be levied accordingly. Following models have been explained herein.

**A) Direct Supply from Seller to Customer**

Sellers have own website for soliciting their business and



not relying on online aggregators like Flipkart, Amazon, Snapdeal for listing of goods. In this case, VAT shall be charged by seller in case of intrastate transaction and CST in case of inter-state movement of goods.

**Example:**

Mr Aniket orders a Service book from the Website poojalawhouse.com. Online website shall be maintained by the seller Pooja law House. The invoice of the Book would generate by the Pooja Law which shall levy VAT on the product sold.

**B) Supply from Seller to Customer via online Intermediary/Aggregators**

Products of sellers are listed on websites like Flipkart, Amazon, Snapdeal who have entered into MOU with e-commerce Platforms. These orders are in turn given to the Seller for delivery of the goods. Seller shall make the invoice and deliver the same to customer directly. Invoice shall contain name of the company/firm, Reg. Address, TIN/CST no. etc. In present case only, Interface is being provided by the online portal.

**Example:**

Mr Karan orders iPhone 4s from the Online Website Snapdeal.com. Snapdeal will book order on the behalf of the Seller named WS Retailer. So, Snapdeal will contact with the WS Retailer to deliver the goods to the customer. The seller shall levy VAT on the goods sold by

seller.

Now these online portals Flipkart, Snapdeal etc. shall generate an invoice of such services like Booking, Commission, Courier, Shipping charges etc. in the name of Seller, as these charges are covered under the definition of taxable services as per the provisions of Finance Act, 1994. In continuation of above example, Snapdeal will generate an invoice and service tax to be charged.

Bill to be charged shall vary according to terms and conditions contained in Memorandum of Understanding with sellers. For example- If the goods are delivered by e-commerce platform to customer then shipping charges shall be charged by platform in the bill. Shipping charges shall also be charged in bill and liable to service tax.

**Seller to Online Portals to Customer**

In this case, seller shall sell goods to e-commerce platform who in turn sells to final customer. Role of e-commerce site shall not be limited to provide interface but becomes the owner of the goods.

**For Example:**

Mr Sushant Kapil orders iPhone 5s from the Online Website Ebay, This site will book order on the behalf of the seller and purchase the goods from Manoj Electronics to deliver the goods to Customers. The invoice of iPhone 5s would be generated by the

Manoj Electronics including TIN No. and address to the Website. Now, this site will issue an invoice to Customer.

**RENDERING OF SERVICES**

Let's first define service as per Service Tax Section 65B(44) of ST Act 'Service' means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include -

- (a) An activity which constitutes merely,--
  - (i) A transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or
  - (ii) A transaction in money or actionable claim

Many E-portals websites are in existence to promote the business of rendering services on behalf of service provider. Various Service model are mentioned below:-

**Service rendered by Online Portals (Like Makemytrip, Expedia etc) to the Service Recipient**

If the service provider is providing service to the customer with help of intermediary (Online Aggregator), in that case service tax shall be levied on the bill raised by Service Provider to the customer. Online Aggregator /intermediary shall raise bill towards service provider and service tax to be levied on same. For Example- Online service providers (like makemytrip, booking.com) provide the relevant information on



destinations, hotels and Airports. They have entered into MOU with hotels and airlines. Invoice is raised by the Service provider (hotel) on the customers. Makemytrip acting as online aggregator raises invoices towards hotel. Service Tax shall be levied on the amount of bill issued by online aggregator.

#### **Direct rendering of Service from Service Provider to Service Receiver**

If the service provider is rendering the online services, then service provider shall be liable to charge service tax from the customer. For example - Online Repairing of computer being provided by the company then it shall be liable to charge Service tax from the customer.

#### **Service being provided from Customer to Customer**

In case of customer to customer transactions, website does not sell anything but provides a platform for the customers for doing sale and purchase .In turn charges for the commission for the service provided and same shall be liable to service tax . No chargeability of Sales Tax in such transactions.

#### **Crowdfunding Websites**

**Crowdfunding** is the practice of funding a project or venture by raising monetary contributions from a large number of people, typically via the internet. These have been becoming very popular of late. People have been able to raise large capital for their venture. These platforms like pikaventure.com, Indiegogo.com and many others are helping entrepreneurs to raise capital for their project. In turn charge minimum fees for raising such amount if target funding is achieved. Amount of fee to be charged shall be liable for service tax.

#### **Issues**

The current dispute has arisen in case of e-commerce companies that undertake storage of goods procured from various sellers in their warehouse before dispatching them to the respective buyers. It appears that Karnataka VAT authorities are of the view that in such cases, the e-commerce companies are involved in supplying and distribution of goods and, therefore, would qualify as 'dealers'. The authorities are also of the view that these companies act as commission agents

or consignment agents of sellers. Therefore, these companies are covered under the definition of 'dealers' and, therefore, are liable to discharge VAT. "The Karnataka Government plans to amend the Value Added Tax Act and bring transactions from e-commerce marketplaces under its ambit, reports **The Times of India.**

#### **Conclusion**

There has been clarity with regards to levy of indirect taxes on ecommerce transactions. Government of the day needs to incentives this sector and assist to make it competitive keeping in view their vision of "MAKE IN INDIA CAMPAIGN" rather than burden with taxes.



## **EXPOSURE DRAFT ON IFRS PRACTICE STATEMENT**

**The International Accounting Standards Board (IASB) has published draft guidance to help company management determine whether information is material. The guidance is part of the IASB's wider initiative to improve disclosures.**

The concept of materiality acts as a filter through which management sifts information to ensure that financial statements include all the financial information that could influence users' investment deci-

sions. It also enables management to present material information in a clear and effective way, excluding information that is not material.

The draft guidance, in the form of a draft Practice Statement, has been developed in response to concerns that management are often uncertain about how to apply the concept of materiality and therefore use the disclosure requirements in the Standards as a checklist. This can result in

excessive disclosure of immaterial information that can obscure useful information and also make financial statements cluttered and less understandable. It can also lead to useful information being left out.

Whether information is material or not depends on a range of factors and entity-specific circumstances, and is a matter of judgement. Determining what information is material also requires an understanding of the users of the financial





statements and the decisions that they make based on those financial statements.

Hans Hoogervorst, IASB Chairman, commented

*Financial statements are meant to be a means of communication, and should not be viewed as a mere compliance exercise. Management needs to take a step back and consider whether they are providing the right level of information in the financial statement and whether it is useful.*

*The Practice Statement should help guide management's judgment, encouraging them to remove repetitive and uninformative wording and im-*

*prove the overall quality of financial statements.*

Improving the quality and quantity of disclosures requires joint efforts by auditors, regulators, companies and standard-setters. The IASB has therefore consulted with the International Auditing and Assurance Standards Board (IAASB) and the International Organization of Securities Commissions (IOSCO) during the development of the draft Practice Statement.

The draft guidance on materiality complements an amendment made to IAS 1 *Presentation of Financial Statements* by the IASB in 2014, which clarified that companies do not need to apply the specific disclosure require-

ments in Standards if the related information is not material. It also specified that a company should consider whether to provide additional disclosures when compliance with the specific requirements would be insufficient in disclosing material information.

Comments are invited on the proposals in this Exposure Draft, particularly on the question set out in the Exposure Draft.



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