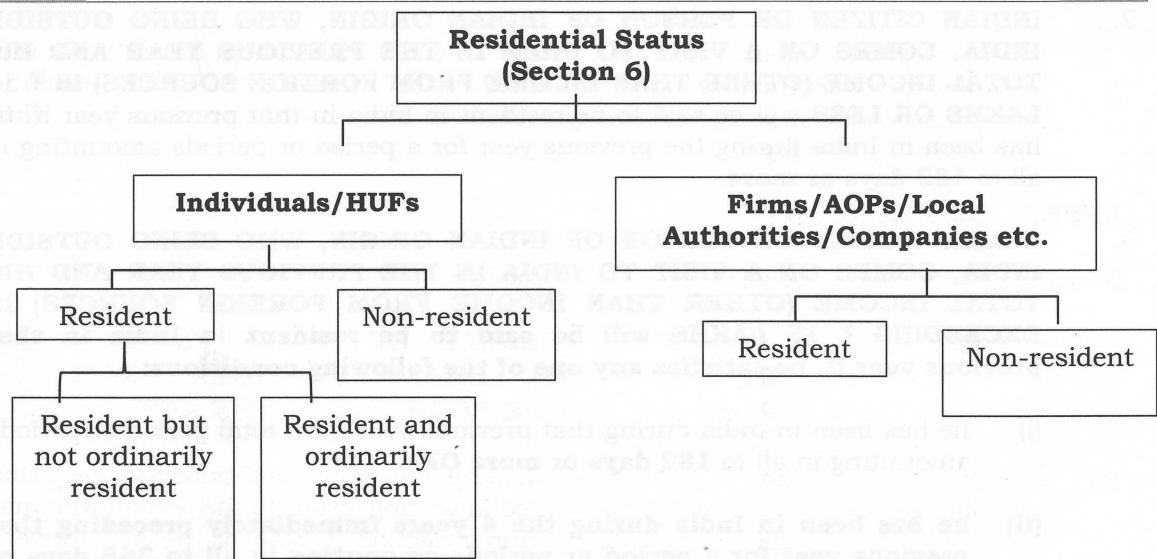


RESIDENTIAL STATUS

SECTION 6: RESIDENCE IN INDIA



RESIDENTIAL STATUS AND SCOPE OF TOTAL INCOME

Sources of Income	Taxability in India		
	Resident and Ordinarily Resident	Resident but Non- Ordinarily Resident	Non- Resident
Income received or deemed to be received in India	✓	✓	✓
Income accrue or arise or deemed to accrue or arise in India	✓	✓	✓
Income accrues or arises to him or received outside India from <ul style="list-style-type: none"> ➢ a business controlled from India; or ➢ profession setup in India 	✓	✓	✗
Income accrues or arises or received outside India	✓	✗	✗

RECENT CIRCULAR ISSUED BY CBDT

It has been clarified that salary accrued to a non-resident seafarer for services rendered outside India on a foreign going ship (with Indian flag or foreign flag) **shall not be included** in the total income merely because the said salary has been credited in the NRE account maintained with an Indian bank by the seafarer.

SECTION 6(1): RESIDENTIAL STATUS ON INDIVIDUAL

1. **INDIAN CITIZEN, WHO LEAVES INDIA IN ANY PREVIOUS YEAR AS A MEMBER OF THE CREW OF AN INDIAN SHIP OR FOR THE PURPOSES OF EMPLOYMENT OUTSIDE INDIA** is said to be resident in India in any previous year if, he has been in India during that previous year for a period or periods amounting in all to **182 days or more**.
2. **INDIAN CITIZEN OR PERSON OF INDIAN ORIGIN, WHO BEING OUTSIDE INDIA, COMES ON A VISIT TO INDIA IN THE PREVIOUS YEAR AND HIS TOTAL INCOME (OTHER THAN INCOME FROM FOREIGN SOURCES) IS ₹ 15 LAKHS OR LESS** will be said to be resident in India in that previous year if, he has been in India during the previous year for a period or periods amounting in all to **182 days or more**.
3. **INDIAN CITIZEN OR PERSON OF INDIAN ORIGIN, WHO BEING OUTSIDE INDIA, COMES ON A VISIT TO INDIA IN THE PREVIOUS YEAR AND HIS TOTAL INCOME (OTHER THAN INCOME FROM FOREIGN SOURCES) IS EXCEEDING ₹ 15 LAKHS** will be said to be resident in India in that previous year if, he satisfies any one of the following conditions:
 - (i) he has been in India during that previous year for a total period or periods amounting in all to **182 days or more** OR
 - (ii) he has been in India during the **4 years immediately preceding that previous year** for a period or periods amounting in all to **365 days or more** and has been in India for at least **120 days in that previous year**.

(Amendment by Finance Act, 2020)

Note: Section 6(6) as amended by Finance Act, 2020 provides that such individual will be “Resident but not Ordinarily Resident” if his stay in India in that previous year is 120 days or more but less than 182 days.

4. CASES NOT COVERED BY 1, 2 & 3 ABOVE

An individual will be said to be resident in India in the previous year, if he satisfies any one of the following conditions:

- (i) He has been in India during the previous year for a total period of **182 days or more**, or
- (ii) He has been in India during the **4 years immediately preceding the previous year** for a period of **365 days or more** and has been in India for at least **60 days in the previous year**.

Note 1: A person is said to be of **Indian Origin** if he or either of his parents or any of his grandparents, was born in Undivided India.

Note 2: For the purpose of section 6, the expression “Income from foreign sources” means the incomes which accrue or arise outside India (except income derived from a business controlled from or a profession set up in India) and which is not deemed to accrue or arise in India.

Therefore “Income from foreign sources” means incomes which accrue or arise outside India **but shall not include**:

1. Incomes which are deemed to accrue or arise in India by virtue of section 9.
2. Income derived abroad from a business controlled from India.
3. Income derived abroad from a profession set up in India.

SECTION 6(1A): DEEMED RESIDENT (Inserted by Finance Act, 2020 w.e.f. A/Y 2021-22)

Notwithstanding anything contained in section 6(1),
an individual,
being citizen of India,
having total income, other than income from foreign sources,
exceeding ₹ 15,00,000 during the previous year
shall be deemed to be resident in India in that previous year,
if he is not liable to tax in any other country or territory
by reason of his domicile or residence or any other criteria of similar nature
This clause shall not apply in case of an individual who is said to be resident in India as per section 6(1).

Note: Section 6(6) as amended by Finance Act, 2020 provides that such citizen of India who is deemed as resident under section 6(1A) shall be said to be “Resident but not Ordinarily Resident” in the said previous year.

Section 2(29A) provides that “liable to tax”, in relation to a person and with reference to a country, means that there is an income-tax liability on such person under the law of that country for the time being in force and shall include a person who has subsequently been exempted from such liability under the law of that country.

SECTION	6(6):	RESIDENT AND RESIDENT/RESIDENT BUT NOT ORDINARILY RESIDENT
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An individual is said to be a **resident and ordinarily resident** if he **satisfies both the following conditions**:

- (i) He is a resident in **any 2 years (or more) out of the last 10 previous years** preceding the relevant previous year, and
- (ii) His **total stay in India in last 7 years** preceding the relevant previous year **is 730 days or more.**

If the individual satisfies both the conditions mentioned above, he is a resident and ordinarily resident but if only one or none of the conditions are satisfied, the individual is a resident but not ordinarily resident.

Illustration 1:

Mr. Ranbir Singh, is living in Dubai since 1985. He comes to India to meet his parents on 01.06.2022 and leaves India for Dubai on:

CASE I	30 th September, 2022
CASE II	30 th November, 2022

He has the following incomes:

		Situation I	Situation II
(i)	Incomes arising in India	₹ 6,00,000	₹ 6,00,000
(ii)	Incomes received abroad but deemed to accrue or arise in India as per section 9	₹ 7,00,000	₹ 7,00,000
(iii)	Incomes arising in Dubai and not deemed to accrue or arise in India	₹ 40,00,000	₹ 40,00,000
(iv)	Income arising in Dubai from a business controlled from India	₹ 10,00,000	Nil

Comment on the residential status of Mr. Ranbir Singh. Further, also tell the taxable amount in the hands of Mr. Ranbir Singh for the assessment year 2023-24.

Solution:

Total Income other than Income from foreign sources	Situation I	Situation II
	₹ 23,00,000	₹ 13,00,000

CASE I & SITUATION I

His income other than income from foreign sources exceeds ₹ 15,00,000. His stay in India is 122 days in previous year 31.03.2023. Assuming that his stay in India is 365 days or more in the period 01.04.2018 to 31.03.2022, he becomes a resident. However, since his stay is less than 182 days, **he shall be a resident but not ordinarily resident**. Therefore ₹ 6,00,000 + ₹ 7,00,000 + ₹ 10,00,000 is taxable in India in P/Y 31.03.2023.

Prior to amendments by Finance Act, 2020 only ₹ 7,00,000 + ₹ 6,00,000 was taxable in India in hands of Mr. Ranbir Singh.

CASE I & SITUATION II

Since his total income other than income from foreign sources is not exceeding ₹ 15 lakhs, the amendments made by Finance Act, 2020 are not applicable to him. He remains to be a Non-Resident since his stay in India does not exceed 182 days in P/Y 31.03.2023. Only ₹ 6,00,000 + ₹ 7,00,000 is taxable in India.

CASE II & SITUATION I AND SITUATION II

He becomes a resident in India since his stay in India during the P/Y 31.03.2023 is 183 days (i.e., 182 days or more). It shall be irrelevant whether his total income (other than income from foreign sources) exceeds ₹ 15 lakhs or not. However, **he shall be Resident but Not Ordinarily Resident if he-**

- (i) is non-resident in any 9 out of 10 previous years preceding P/Y 31.03.2023; or
- (ii) during the 7 previous years preceding the P/Y 31.03.2023 has been in India for 729 days or less.

Assuming he is Resident but Not Ordinarily Resident,

Situation I: ₹ 6,00,000 + ₹ 7,00,000 + ₹ 10,00,000 shall be taxable in India.

Situation II: ₹ 6,00,000 + ₹ 7,00,000 shall be taxable in India.

Illustration 2:

Mr. Abhinav Jhakira is living in Cyprus, a tax heaven. He is a citizen of India and left India in 1972. Since then, he has not returned to India for a single day.

Details of his income for the financial year 2022-23 are as follows:

	Situation I	Situation II
(i) Incomes arising in India	₹ 6,00,000	₹ 6,00,000
(ii) Incomes received abroad but deemed to accrue or arise in India as per section 9	₹ 7,00,000	₹ 7,00,000
(iii) Incomes arising in Cyprus and not deemed to accrue or arise in India	₹ 40,00,000	₹ 40,00,000
(iv) Income arising in Cyprus from a business controlled from India	₹ 10,00,000	₹ 1,00,000

Comment on his residential status and taxable income in his hands for the A.Y. 2023-24.

Solution:

Total Income other than Income from foreign sources	Situation I	Situation II
	₹ 23,00,000	₹ 14,00,000

SITUATION I

Since Mr. Abhinav is not taxable anywhere in the world by reason of his domicile in Cyprus, a tax heaven, he is deemed as Resident as per section 6(1A) as his total income excluding income from foreign sources exceeds ₹ 15,00,000.

Further, as per section 6(6), he shall be deemed as resident but not ordinarily resident

He shall be liable to pay tax in India on ₹ 6,00,000 + ₹ 7,00,000 + ₹ 10,00,000 = ₹ 23,00,000.

SITUATION II

Section 6(1A) is not applicable since his total income excluding income from foreign sources does not exceed ₹ 15,00,000. He is a non-resident and is liable to pay tax in India on ₹ 6,00,000 + ₹ 7,00,000 = ₹ 13,00,000.

SECTION 6(2): RESIDENTIAL STATUS OF HUFS

Resident: HUF would be resident in India if the **control and management** of its affairs is situated **wholly or partly in India**.

Non-resident: If the **control and management** of the affairs is situated **wholly outside India** it would become a non-resident.

Resident and ordinarily resident/Resident but not ordinarily resident: If the HUF is resident, then the **status of the Karta determines whether it is resident and ordinarily resident** or resident but not ordinarily resident.

- If the Karta is resident and ordinarily resident, then the HUF is resident and ordinarily resident.
- If the Karta is resident but not ordinarily resident, then HUF is resident but not ordinarily resident.

RESIDENTIAL STATUS OF FIRMS AND ASSOCIATION OF PERSONS

Resident: A firm and an AOP would be resident in India if the **control and management** of its affairs is **situated wholly or partly in India**.

Non-resident: Where the **control and management of the affairs** is situated **wholly outside India**, the firm and AOP would become a non-resident.

SECTION 6(3): RESIDENTIAL STATUS OF A COMPANY

A company is said to be resident in India in any previous year, if,—

- (i) it is an Indian company; or
- (ii) its place of effective management, in that year, is in India.

Note: For the purposes of this clause "place of effective management" (POEM) means a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance made.

♦ ANALYSIS OF CBDT CIRCULARS ENLISTING GUIDING PRINCIPLES FOR DETERMINATION OF POEM OF A COMPANY♦

The guidelines for determining POEM as given in circular issued by CBDT shall apply to a company having turnover or gross receipts exceeding ₹50 crores in the financial year.

1. A company is said to be engaged in "ACTIVE BUSINESS OUTSIDE INDIA" and hence its POEM is outside India

If it satisfies all the following conditions				
Passive income is 50% or less of its Total Income ¹	Less than 50% of total assets situated in India [†]	Less than 50% of total employees situated in India or are resident in India [†]	Payroll expenses of employees situated in India or resident in India is less than 50% of total payroll expenditure [†]	Majority meetings of Board of Directors are held outside India

Note 1: Income to be computed as per tax laws of the country where such company is incorporated. Otherwise as per books of account if tax laws of that country does not require computation.

Note 2: The value of assets shall be

¹ the average of data of the previous year and two preceding years shall be taken. Where Company is in existence for a shorter period, then data for shorter period is to be considered.

- (a) **Depreciable assets** – Average of its value for tax purposes at the beginning and end of Previous Year.
- (b) **Other assets** – Value as per books of account

Note 3: **Number of Employees** shall be average of number of employees at the beginning and end of the previous year. Employees shall include persons who are not directly employed but performs functions similar to employees e.g. contractual persons.

Note 4: “**Payroll**” includes cost of salaries, wages, bonus plus employee’s compensation including pension and social costs borne by employer.

Note 5: **Passive income shall be aggregate of**

- (i) Income from transactions where both the purchase and sale of goods is from/to its associated enterprises and
- (ii) Income by way of royalty, dividend, capital gains, interest and rental income whether derived from associated or non-associated enterprises.

2. COMPANIES OTHER THAN THE COMPANIES ENGAGED IN ACTIVE BUSINESS OUTSIDE INDIA

First Stage	Second Stage
Identify the persons who actually make key management and commercial decisions for conduct of company's business as a whole.	Determination of place where the decisions are in fact being made. Place where management decisions are taken would be more, important than the place where such decisions are implemented.

GUIDING PRINCIPLES

GUIDING FACTOR I: Location Where Board Meetings are held

The location where a company's Board regularly meets and makes decisions may be the company's place of effective management provided, the Board—

- (i) retains and exercises its **authority to govern the company**; and
- (ii) does, **in substance, make the key management and commercial decisions** necessary for the conduct of the company's business as a whole.

Note 1: It may be mentioned that mere formal holding of board meetings at a place would by itself not be conclusive for determination of POEM being located at that place. **If the key decisions by the directors are in fact being taken in a place other than the place where the formal meetings are held then such other place would be relevant for POEM.** As an example, this may be the case where the board meetings are held in a location distinct from the place where head office of the company is located or such location is unconnected with the place where the predominant activity of the company is being carried out.

For example, a foreign company has head office in Mumbai and if factory is in Malaysia, BOD meets in Malaysia, then Malaysia is POEM. However, if BoD meets in Paris, then POEM is not Paris.

Note 2: If a board has de facto delegated the authority to make the key management and commercial decisions for the company to the senior management or any other person including a shareholder, promoter, strategic or legal or financial advisor etc. and does nothing more than routinely ratifying the decisions that have been made, the company's place of effective management will ordinarily be the place where these senior managers or the other person make those decisions.

Note 3: However, if it is established that Board of Directors are standing aside and not exercising their powers of management and such powers of management are exercised by holding company or any other person resident in India, then POEM SHALL BE CONSIDERED IN INDIA.

For this purpose, merely because the Board of Directors (BOD) follows general and objective principles of global policy of the group laid down by the parent entity which may be in the field of Pay roll functions, Accounting, Human resource (HR) functions, IT infrastructure and network platforms, Supply chain functions, Routine banking operational procedures, and not being specific to any entity or group of entities per se; would not constitute a case of BoD of company standing aside.

It may be noted that the provisions of General Anti-Avoidance Rule contained in Chapter X-A of the Income-tax Act, 1961 may get triggered in such cases where the above clarification is found to be used for abusive/aggressive tax planning.

GUIDING FACTOR II: Board Delegating Authorities to Committees

If BOD has delegated some or all of its major authorities to one or more committees like executive committee, consisting of senior management, the POEM shall be at the place where

- Members of executive committee are based and
- Where committee develops and formulate key decisions for formal approval by Board

For example, a foreign company has head office in London. Board of Directors meetings are held in London. But BOD has delegated major powers to a committee in Mumbai and members of this committee are based in Mumbai. The BOD formally approves decisions of committee. Now POEM shall be in Mumbai, i.e. India

GUIDING FACTOR III: Location of Head Office

"Head Office" of a company would be the place where the company's senior management and their direct support staff are located or, if they are located at more than one location, the place where they are primarily or predominantly located. A company's head office is not necessarily the same as the place where the majority of its employees work or where its board typically meets. Location of Head Office is very important in determining POEM. Head office represents the place where key decisions are taken.

- If company's head office, i.e. the place where senior management and their support staff are based, is in one place and that location is held out to public as principal place of business, then POEM is at the place where Head Office is located.

- If the company is more decentralized (say where senior management operates, from time to time at offices located in various countries) then the company's head office would be the location where these senior managers
 - (i) are primarily or predominantly based or
 - (ii) normally return to following travel to other locations; or
 - (iii) meet when formulating or deciding key strategies and policies for the company as a whole.

However, where the senior management is so decentralized that it is not possible to determine the company's head office with a reasonable degree of certainty, the location of a company's head office would not be of much relevance in determining that company's place of effective management.

GUIDING FACTOR IV: Residence of Directors and Other Key Management Persons

In today's modern world, physical presence is not required to take a decision. **The decisions may be taken by Video-conferencing, Skype, and use of technology without person being physically present.**

Therefore, **the place where directors and key management persons resides will be a determinative factor for POEM.**

GUIDING FACTOR V: Circular Resolutions

If **decisions are taken by circular resolution**, then it should be determined that which persons have the authority to pass Circular Resolution. **The place of location of these persons will be determinative of POEM.**

GUIDING FACTOR VI: Location of strategic shareholders

Normally, the decisions like dissolution, liquidation, sale of major part of undertaking, etc., are taken by shareholders. These decisions are for existence of company and do not relate to management of company. Therefore, shareholders location is not determinative of POEM.

But if shareholders through a shareholder's agreement takes indirectly the management of a company, for example,

- Any contract above 10,00,000 to be approved by shareholders
- Any payment above 5,00,000 to be approved by shareholders
- In the above case, the management is in fact in hands of shareholder.

Therefore, the location of shareholders will determine the POEM.

Note: It may be clarified that day to day routine operational decisions undertaken by junior and middle management shall not be relevant for the purpose of determination of POEM. The operational decisions relate to the oversight of the day-to-day business operations and activities of a company whereas the key management and commercial decision are concerned with broader strategic and policy decision. For example, a decision to open a major new manufacturing facility or to discontinue a major product line would be examples of key commercial decisions affecting the company's business as a whole. By contrast, decisions by the plant manager appointed by senior management to run that facility, concerning repairs and maintenance, the implementation of company-wide quality controls and human resources policies, would be examples of routine operational decisions.

OTHER GUIDING FACTORS:

If the above factors do not lead to clear identification of POEM, then the following secondary factors can be considered:

- (i) Place where main and **substantial activity of the company** is carried out; or
- (ii) Place where the **accounting records of the company** are kept.

It needs to be emphasized that the determination of **POEM** is to be based on all relevant facts related to the management and control of the company, and is not to be determined on the basis of isolated facts that by itself do not establish effective management, as illustrated by the **following examples**:

- (i) **The fact that a foreign company is completely owned by an Indian company** will not be conclusive evidence that the conditions for establishing POEM in India have been satisfied.
- (ii) **The fact that there exists a Permanent Establishment of a foreign entity in India** would itself not be conclusive evidence that the conditions for establishing POEM in India have been satisfied.
- (iii) **The fact that one or some of the Directors of a foreign company reside in India** will not be conclusive evidence that the conditions for establishing POEM in India have been satisfied.
- (iv) **The fact of, local management being situated in India in respect of activities carried out by a foreign company in India** will not, by itself, be conclusive evidence that the conditions for establishing POEM have been satisfied.
- (v) **The existence in India of support functions that are preparatory and auxiliary in character** will not be conclusive evidence that the conditions for establishing POEM in India have been satisfied.

The Assessing Officer (AO) shall, before initiating any proceedings for holding a company incorporated outside India, on the basis of its POEM, as being resident in India, seek prior approval of the Principal Commissioner or the Commissioner, as the case may be.

Further, in case the AO proposes to hold a company incorporated outside India, on the basis of its POEM, as being resident in India then any **such finding shall be given by the AO after seeking prior approval of the collegium of three members** consisting of the **Principal Commissioners or the Commissioners**, as the case may be, to be constituted by the Principal Chief Commissioner.

Illustration:

John Butler Tax. Inc., is a company incorporated in Colombo, Sri Lanka. 60% of its shares are held by I Pvt. Ltd., a domestic company. John Butler Tax. Inc. has its presence in India also. The data relating to John Butler Tax. Inc., are under:

Particulars	India	Sri Lanka
Fixed assets at depreciated values for tax purposes (₹ in crores)	90	70
Intangible assets (₹ in crores)	40	180
Other assets (₹ in crores)	30	90
Income from trading operations (₹ in crores)	15	42
Income from investments (₹ in crores)	30	13
Number of employees (Residents in respective countries)	40	60

For POEM purposes, state whether,

- (i) The company shall be said to be engaged in 'active business outside India'.
- (ii) Because of increased operations in India, more manpower is needed. 30 more employees may be required in this regard. The company can either take these employees directly in its roll or can outsource the increased operation to an external agency which will engage the 15 employees in its roll and finish the work for the company. Which choice will be better?

Note: If for any test, average figures are needed, the same may be ignored and the data as given above to the applicant may be used.

Answer:

Now, as per the information given in the question:

- (a) **The percentage of total assets in India viz-a-viz total assets all over the world** is computed as under:

$$\text{Total Assets worldwide} = 90+70+40+180+30+90 = ₹ 500 \text{ crore}$$

$$\text{Total Assets in India} = 90+40+30 = ₹ 160 \text{ crore}$$

$$\begin{aligned}\text{Assets situated in India: Total Assets} &= 160 : 500 \\ &= 160 / 500 \times 100 = 32\%\end{aligned}$$

- (b) **The percentage of passive income viz-a-viz total income worldwide** is computed below:

$$\text{Passive Income} = ₹ 43 \text{ Crore}$$

$$\text{Total Income} = ₹ 100 \text{ Crore}$$

$$\text{Passive Income: Total Income} = 43\%$$

- (c) **Number of Employees in India:** Total Employees worldwide = 40 : 100 = 40%.

Therefore, the answers are as under:

- (i) All conditions of "**ACTIVE BUSINESS OUTSIDE INDIA**" are satisfied and therefore the POEM of John Butler Tax Inc. **shall be outside India**
- (ii) As per POEM Rules, Employees shall include persons who are not directly employed but performs functions similar to employees e.g. contractual persons. If 30 employees are employed in India, then,

$$\text{Number of Employees in India: Total Employee} = 70 : 130 = 53.84\%$$

Then company shall not be said to have "ACTIVE BUSINESS OUTSIDE INDIA".

If outsourcing of work is done to an external agency which will engage 15 employees then number of Employees in India: Total Employee = 55 : 115 = 47.82%

The company shall be said to have "ACTIVE BUSINESS OUTSIDE INDIA":

Therefore, the choice of outsourcing is better.

CONSEQUENCES OF FOREIGN COMPANY HAVING POEM IN INDIA

NOTIFICATION NO. 29/2018, DATED 22-6-2018: Section 115JH, Read with Section 6, of The Income-Tax Act, 1961 - Foreign Company Said to be Resident in India - Notified Modifications and Adaptations

(i) **If the foreign company is assessed to tax in the foreign jurisdiction, and,—**

- (a) **where it is required to take into account depreciation for the purpose of computation of its taxable income,** the written down value (hereinafter referred to as WDV) of the depreciable asset as per the tax record in the foreign country on the 1st day of the previous year shall be adopted as the opening WDV for the said previous year,
- (b) **in cases where it is not required to take into account depreciation for purpose of computation of its taxable income,** the WDV shall be calculated in the manner, as though the asset was installed, utilised and the depreciation was actually allowed as per the provisions of the laws of that foreign jurisdiction and the WDV so arrived at as on the 1st day of the previous year, shall be adopted to be the opening WDV for the said previous year.

(ii) **If the foreign company is not assessed to tax in the foreign jurisdiction,** then WDV of the depreciable asset as **appearing in the books of account** as on the 1st day of the previous year maintained in accordance with the laws of that foreign jurisdiction shall be adopted as the opening WDV for the said previous year.

(iii) **If the foreign company is assessed to tax in the foreign jurisdiction,** its brought forward loss and unabsorbed depreciation as per the tax record shall be determined year wise on the 1st day of the said previous year.

(iv) **If the foreign company is not assessed to tax in the foreign jurisdiction,** its brought forward loss and unabsorbed depreciation as per the books of account prepared in accordance with the laws of that country shall be determined year wise on the 1st day of the said previous year.

(v) **The brought forward loss and unabsorbed depreciation of the foreign company as arrived at para (iii) or (iv), as the case may be, shall be deemed as loss and unabsorbed depreciation brought forward as on the 1st day of the said previous year** and shall be allowed to be set off and carried forward in accordance with the provisions of the Act for the remaining period calculated from the year in which they occurred for the first time taking that year as the first year.

Provided that the losses and unabsorbed depreciation of the foreign company shall be allowed to be set off only against such income of the foreign company which have become chargeable to tax in India on account of it becoming Indian resident.

Illustration 1:

If unabsorbed business loss occurred in the hands of the foreign company in AY 2020-21 and such loss has not been set-off subsequently and the foreign company's POEM was found to be in India in assessment year 2023-24, then such business loss shall be available for carry forward only for the remaining period out of 8 assessment years commencing from Assessment Year 2021-22 in terms of

section 72 i.e., such loss can be set-off in Assessment Year 2023-24 to Assessment Year 2028-29.

Illustration 2:

The brought forward loss/ unabsorbed depreciation would not be allowed to be set off against income of the foreign company which would have been subject to tax in India even in its capacity as a non-resident even if POEM was not there. Accordingly, the brought forward loss/ unabsorbed depreciation can be set off only against such income of the foreign company which became chargeable to tax in India only by virtue of the foreign company becoming resident in India on account of POEM in India.

Where ‘royalty’ income earned by a foreign company is subject to tax in India in its capacity as a non-resident since the know how is utilized in India and the foreign company is also treated as resident in India on account of its POEM in India, then the brought forward loss/unabsorbed depreciation would not be permitted to be set off against such ‘royalty’ income.

- (vi) **In cases where the brought forward loss and unabsorbed depreciation** referred to in para (iii) or (iv), as the case may be, originally adopted in India are **revised or modified in the foreign jurisdiction** due to any action of the tax or legal authority, the amount of the loss and unabsorbed depreciation shall be revised or modified for the purposes of set off and carry forward as referred to in para (v).
- (vii) **In cases where the accounting year does not end on 31st March**, the foreign company shall be required to prepare profit and loss account and balance sheet for the period starting from the date on which the accounting year immediately following said accounting year begins, upto 31st March of the year **immediately preceding the period beginning with 1st April and ending on 31st March during which the foreign company has become resident**. The foreign company shall also be required to prepare profit and loss account and balance sheet for succeeding periods of twelve months, beginning from 1st April and ending on 31st March, till the year the foreign company remains resident in India on account of its POEM.

For example, foreign company follows accounting year as 1st January to 31st December. Now, Foreign Company becomes resident in India in Previous Year 31.3.2023 on account of its PoEM in India.

Now, foreign company shall prepare its Profit & Loss Account and Balance Sheet as under:

- (i) for the period **1-1-2022 to 31-3-2022**
- (ii) for the year 1-4-2022 to 31-3-2023
- (iii) for 12 months ending on 31st March in every subsequent year in which it is resident on account of POEM.

If accounting year is 1st July to 30th June, then foreign company shall prepare its Profit & Loss Account and Balance Sheet:

- (i) for the period **1-7-2021 to 31-3-2022**
- (ii) for the year 1-4-2022 to 31-3-2023
- (iii) for 12 months ending on 31st March in every subsequent year in which it is resident on account of POEM.

- (viii) For the purpose of carry forward of loss and unabsorbed depreciation in cases where the accounting year followed by the foreign company does not end on 31st

March and the period starting from the date on which immediately following year begins upto 31st March of the year, **immediately preceding the period beginning with 1st April and ending on 31st March during which it has become resident**, is,—

- (a) **less than six months**, it shall be included in that accounting year;
- (b) **equal to or more than six months**, that period shall be treated as a separate accounting year.

Thus, if the accounting year followed by the foreign company is calendar year, the accounting year immediately preceding the accounting year in which the foreign company is held to be resident in India, shall be increased by three months, i.e., 1st January to 31st March; and if the accounting year followed by the foreign company is from 1st July to 30th June, the accounting year immediately preceding the accounting year in which the foreign company is held to be resident in India, shall be of nine months from 1st July to 31st March.

- (ix) **In cases covered under para (viii), loss and unabsorbed depreciation as per tax record or books of account, as the case may be, of the foreign company shall, be allocated on proportionate basis.**

For example, the accounting year followed by the foreign company is 1st January to 31st December. The company became Resident in India on account of POEM in Previous Year 31.3.2023.

Now, accounting year of the company i.e, 31-12-2021 shall be increased by 3 months. The accounting year of company shall be from 1-1-2021 to 31-3-2022.

Loss as per tax records in foreign country:

1-1-2021 to 31-12-2021	100 Lakh
1-1-2022 to 31-12-2022	200 Lakh

Now, loss for Previous Year 31-3-2022 shall be taken to be 100 Lakhs + 200 × 3/12 = 150 lakhs.

For example, the accounting year followed by the foreign company is 1st July to 30th June. The company becomes resident in India on account of POEM in Previous Year 31-3-2023.

Now, accounting year of the company shall be:

1-7-2020 to 30-6-2021
1-7-2021 to 31-3-2022

Loss as per Tax records in foreign country

1-7-2020 to 30-6-2021	100 Lakhs
1-7-2021 to 30-6-2022	200 Lakhs

Now, loss of accounting year 1-7-2021 to 31-3-2022 is 200 × 9/12 = 150 Lakhs.

- (x) **Where more than one provision of Chapter XVII-B (TDS) of the Act applies to the foreign company as resident as well as foreign company, the provision applicable to the foreign company alone shall apply.**

Applicability of other provisions to a 'foreign company' resident in India

It is provided that where there is a conflict between the provisions applicable to resident as well as foreign company, the provision applicable to the foreign company alone shall prevail.

Illustration:

The withholding tax obligation on payment for 'works contract' by a resident in India to such foreign company deemed to be resident in India on account of POEM shall be governed by the provisions of section 195 as against section 194C; section 195 being specific to foreign company shall prevail over section 194C.

The rate of income tax as applicable to a foreign company (currently 40%) shall continue to apply, even though the tax status of the foreign company changes from non-resident to resident on account of POEM. Hence, if a resident in India awards a works contract to foreign company having POEM in India, **then resident shall deduct TDS @ 40% under section 195 on payment made to foreign company.**

- (xi) The foreign company shall be entitled to relief or deduction of taxes paid in accordance with the provisions of section 90 or section 91 of the Act.

NOTE 1: The above exceptions, modifications and adaptions **shall not apply in respect of such income of the foreign company becoming Indian resident on account of its POEM being in India which would have been chargeable to tax in India, even if the foreign company had not become Indian resident.**

NOTE 2: Any transaction of the foreign company with any other person or entity under the Act shall not be altered only on the ground that the foreign company has become Indian resident.

Illustration:

Where the shares of a foreign company deemed to be resident in India on account of POEM held by a non-resident entity are transferred outside India, then such sale will not be taxable in the hands of non-resident seller in India, merely because such company is deemed to be resident in India, unless it meets the test of substantial assets being located in India in terms of Explanation 5 to section 9(1)(i) of the Act.

NOTE 3: **In case of conflict between the provision applicable to the foreign company as resident and the provision applicable to it as foreign company, the later shall generally prevail. Therefore, the rate of tax in case of foreign company shall remain the same, i.e., rate of income-tax applicable to the foreign company even though residency status of the foreign company changes from non-resident to resident on the basis of PoEM.**