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# *The DTC – Taxation of Foreign Companies*

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## ***Branch Profits Tax***

- Tax rate parity between domestic and foreign companies maintained (39.13% / 40.50%)
- BPT and DTAA
- Treaty override?
- Implications of BPT
  - Special Source Income [0% / 15% / 20% / 32%]
  - Income subject to tax on presumptive basis [4.2% / 5.67% / 12.57%]
- Interplay between BPT and MAT [ 24.30% / 26.30% / 32% ]
- Credit for BPT in the home country

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## ***Definition of Business Connection and Permanent Establishment***

- Inclusive definition of “business connection”
  - Exclusion for independent agent
- PE definition without thresholds :
  - Service PE
  - Construction / installation PE
- No exclusion for “ancillary / preparatory activities” [Article 5(4) ]
- PE for insurance companies
  - No exclusion for dependent agents
- Substantial equipment PE (used by, for or under any contract with assessee)

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## ***Implications of wider definition of Permanent Establishment***

- When benefit of treaty benefit is denied due to GAAR provisions overriding DTAA provisions
- When benefit of treaty benefit is denied due to BPT provisions overriding DTAA provisions
- When benefit of treaty is not available in absence of TRC as per the format to be prescribed
- Taxation of Special Source Income for non-treaty country

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## ***Indirect Transfer***

- Can an exemption provision or a computation provision, make income subject to tax in India?
- Is this intended / practical / possible that –
  - Transfer of less than 50% stake (say 2%) in the foreign holding company results in Indian tax liability?
  - Transfer of listed shares outside India results in Indian tax liability?
  - The India tax liability be invoked with reference to any foreign company in a holding structure?
  - Internal re-structuring not involving third party are subjected to tax in India?
  - The FMV of the assets held in and outside India is calculated on a daily basis? What methods to apply for such calculations?
  - Computation mechanism unclear for multi layer structure

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## ***Place of Effective Management (POEM)***

(192) “place of effective management” means—

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

(ii) 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:

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## ***POEM – Some of the Issues***

- Is the broad definition of POEM required when GAAR and CFC provisions are also introduced?
- Is it desirable / intended / justifiable that a foreign company is treated as a tax resident of India –
  - Even in a situation where the decisions pertaining to only Indian business are made by the officers of the company in India (not the decisions relevant for the entire company) ?
  - One of the board meetings of the company is conducted in India?
  - One of the directors of the company made few decisions applicable to the company while he is on a short trip to India?
  - One of the employees of the Indian group entity has a global role to play?

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## ***POEM – Some of the Issues.....***

- Meanings of “routinely”, “executive directors”, “officers”, “commercial and strategic decisions”, “functions” and “performance of functions”
- Treaty override?
- Are we reading too much in the definition?



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## ***Gross Basis Tax***

- Increase in rate to 20%
- Presumption of expenses being allowed
- BPT interplay – unclear

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## ***Thank You***

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