

F No 370142/19/2017-TPL
Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes

New Delhi, Dated 15th June, 2017

Subject: Draft Notification of exception, modification and adaptation in respect of foreign company said to be resident in India under Section 115JH of the Income-tax Act, 1961– comments and suggestions-reg.

Finance Act, 2016, *inter alia*, introduced special provisions in respect of foreign company said to be resident in India on account of Place of Effective Management (PoEM) by way of insertion of a new Chapter XII-BC consisting of Section 115JH in the Income-tax Act, 1961 (the Act) with effect from 1st April, 2017.

2. Section 115JH of the Act, *inter alia*, provides that the Central Government may notify exception, modification and adaptation subject to which, provisions of the Act relating to computation of total income, treatment of unabsorbed depreciation, set off or carry forward and set off of losses, collection and recovery and special provisions relating to avoidance of tax shall apply in a case where a foreign company is said to be resident in India due to its PoEM being in India for the first time and the said company has never been resident in India before.

2.1 It has been further provided that these transitional provisions would also cover any subsequent previous year upto the date of determination of PoEM in an assessment proceedings.

3. Accordingly, a draft notification in this regard has been prepared and is as under:

“The Central Government hereby notifies the exceptions, modifications and adaptations for application of provisions of the Act on the computation of total income, treatment of unabsorbed depreciation, set off or carry forward and set off of losses, collection and recovery and special provisions relating to avoidance of tax in respect of the foreign company, said to be resident in India in any previous year on account of its Place of Effective Management (PoEM) being in India, and said foreign company is not previously assessed in India as such; as under:

- (i) If the foreign company is assessed to tax in the foreign jurisdiction, the written down value (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 relevant previous year.*
- (ii) If the said foreign company is not assessed to tax in the jurisdiction where it is based, then WDV of the depreciable asset as appearing in the books maintained in accordance with the laws of that foreign jurisdiction shall be adopted.*
- (iii) If the foreign company is assessed to tax in the foreign jurisdiction, its brought forward loss or unabsorbed depreciation as per the tax record shall be*

determined year wise on the 1st day of the previous year in which it is said to be resident in India. They shall be deemed as losses or unabsorbed depreciation brought forward on the 1st day and shall be allowed to be set off and carried forward in accordance with the provisions of the Act.

- (iv) Where the foreign company is not assessed to tax in the foreign jurisdiction, its brought forward loss or unabsorbed depreciation as per the books prepared in accordance with the laws of that country shall be determined year wise on the 1st day of the previous year in which it is said to be resident in India. They shall be deemed as losses or unabsorbed depreciation brought forward on the 1st day and shall be allowed to be set off and carried forward in accordance with the provisions of the Act.
- (v) In cases where the accounting year does not end on 31st March, the foreign company shall be required to prepare profit & loss account and balance sheet for the period starting from the date on which the accounting year immediately following said accounting year begins, to 31st March of the year immediately preceding the period beginning with 1st April and ending on 31st March during which the foreign company has turned resident. The foreign company shall also be required to prepare profit & loss account and balance sheet for succeeding periods of twelve months, beginning from 1st April and ending on 31st March, till the year the said foreign company remains resident in India on account of its PoEM.
- (vi) For the purpose of carry forward of loss, in cases where the accounting year does not end on 31st March and the period starting from the date on which immediately following year begins to 31st March of the year, immediately preceding the period beginning with 1st April and ending on 31st March during which the foreign company has turned 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 of 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 on the basis of its PoEM, shall be increased by three months, i.e., 1st January to 31st March and if the accounting year of 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 on the basis of its PoEM, shall be of 9 months from 1st July to 31st March.

- (vii) Where more than one provision of Chapter XVII-B of the Act apply to the foreign company as resident as well as foreign company, the provisions applicable to the foreign company shall apply.
- (viii) The provisions contained under sub-section (2) of section 195 of the Act shall apply in such manner so as to include payment to the foreign company.

- (ix) Once the foreign company is held to be resident in India on account of its PoEM in India, it shall be entitled to relief or deduction of taxes paid in accordance with the provisions of section 90 or section 91 of the Act.
- (x) The rate of exchange for conversion into rupees of value expressed in foreign currency, wherever applicable, shall be in accordance with provision of Rule 115 of the Income-tax Rules, 1962.

2. The above exceptions, modifications and adaptations shall be applicable where a foreign company is said to be resident in India in any previous year on account of its PoEM being in India and such foreign company has not been resident in India in any of the previous years preceding the said previous year for the purposes of taxation of said foreign company only and all transactions of the said foreign company with other person or entity under the Act shall not be altered only on the ground that the said foreign company has turned resident on account of its PoEM being in India.

3. Subject to the above, the foreign company shall continue to be treated as a foreign company even if it is said to be resident in India on account of its PoEM being in India and all the provisions of the Act shall apply accordingly. Consequently the provisions specifically applicable to,-

- (i) a foreign company shall continue to apply to it; and
- (ii) non-resident persons shall not apply to it and the provisions specifically applicable to resident shall apply to it.

Thus, 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.

4. This notification shall be deemed to have come into force from the 1st day of April, 2017."

5. **The comments and suggestions of stakeholders and general public on the above draft notification are invited. The comments and suggestions may be sent electronically by 23rd June, 2017 at the email address, dirtpl1@nic.in.**

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