



Seminar C

The Taxable Residence of Companies



Summary

- I. Tax residence criteria under domestic law
- II. Domestic tax audits on tax residence of companies
- III. Pointers of tax residence of companies under case law
- IV. Treaty issues relating to tax residence of companies

PoI (US)

US Federal Income Tax uses the PoI test:

- “Domestic corporation” = corporation created or organised in, or under the law of, the US or any State thereof (e.g. Delaware)
- “Foreign corporation” = any corporation that is not a domestic corporation

Issues Posed by Pol

- Ability to avoid residence-based taxation of foreign-source income, by using a foreign-incorporated company
- Dual residence if Pol is in the US and PoEM is in another state
- Dual non-residence if Pol is in the state where PoEM is situated and they are both in another state

Upsides of Pol (US)

- No US tax reform proposals include moving away from Pol:
 - Simple and clear
 - Stable: part of US tax law since 1909
 - PoEM test would discourage management activities in the US
 - Unlikely that US law will change in this regard

PoEM

- **UK** has two domestic tests:
 - 1) “Place of central management and control”
(same as PoEM?); or
 - 2) Pol

- A UK resident company is non-resident if it is so treated under a treaty
 - WHT
 - Treaty entitlement

PoEM

- **India** has two domestic tests:
 - 1) Pol; or
 - 2) Control and management of affairs situated ***wholly*** in India during tax year
- **Cf. Direct Taxes Code Bill 2013:**

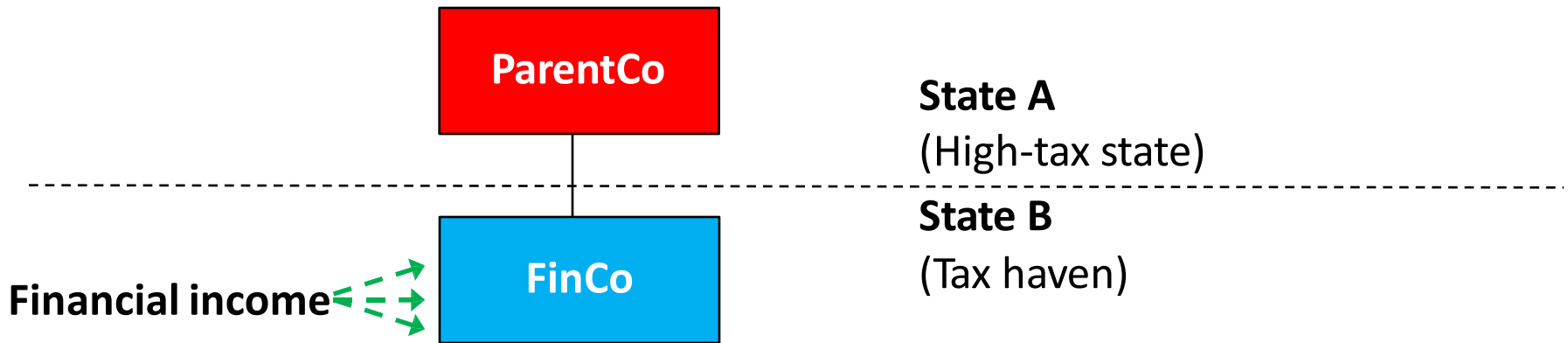
PoEM, ***at any time***, in India

Where key management and commercial decisions that are necessary for the conduct of the business of the entity as a whole are, in substance, made

Territoriality

- No tax residence criteria?
 - such as France
- Neither Pol nor PoEM
- Tax residence matters for:
 - WHT or branch tax purposes
 - Foreign-source passive income of companies
 - “resident” in France considered – French source income

Strategies for Tax Authorities



- ParentCo is the main shareholder of FinCo
- FinCo is a group finance company incorporated in State B (non-EU country, low taxation)
- FinCo's sole director must comply with ParentCo's strict investment guidelines. No further employees
- FinCo has a small office in State B

Strategies for Tax Authorities

1. CFC test
2. PoEM test
3. Look-through approach (GAAR or substance over form)
4. PE test (e.g. PoM)
5. TP

Tax Audits and PoEM in Practice

- Have tax authorities developed **guidelines for tax audits** to detect tax residence of companies?
- How are **tax audits carried out in practice**?
- What type of **evidence** is being sought?

Tax Audits and Evidence

- Are management and key employees interviewed?
 - Can the outcome of these interviews be used in subsequent tax court procedures?
- Are emails being retrieved?
- Are tax opinions from lawyers / accountants being examined?
 - Do taxpayers have a legal obligation to present these documents to the tax authorities?
- Are there legal barriers established by the other state?
- Do the tax authorities of the other state support domestic tax audits (e.g. EoI)?
- Visual inspection of the office facilities in the other state?

Successful PoEM Test and Tax Issues

- **Determination of income** (domestic or foreign GAAP)?
- **Attribution of income** (all income or income connected with PoEM)?
- **Retrospective use of elections** (e.g. group taxation)?
- **Avoidance of double taxation** (credit or exemption method, mutual agreement and arbitration procedures and time for submission)?

Successful PoEM Test and Tax Issues

- **Interest on additional taxes** for tax audit years (e.g. Germany 6% non-deductible)?
- **Discontinuance of tax residence** through taxable periods (e.g. exit taxes, step-up)?
- **Tax crimes** (additionally or alternatively)?
- **Exit taxes in the non-PoEM state?**

Pointers under Case Law

- The role of directors
- The role of shareholders
- Top v. Day-to-Day Management
- Outsourcing

Guidelines for Corporate Groups

- Parental control: distinguish shareholder control from business control
- Quality (not quantity) of subsidiary's directors
- Board meetings: quorum, location and contents
- Dangers of telephone board meetings
- Beware usurpation of board's powers
- Full and accurate minutes

Guidelines for Corporate Groups

- Supportive activities vs. strategic managerial decisions
- Track record to evidence PoEM:
 - Minutes, tickets, hotel receipts, etc.
- Create internal group operating protocol
- Comply with substance requirements of respective state
 - E.g. Dutch minimum substance requirements

Certificates of Tax Residence

India

- Clarity since 2003 Supreme Court decision in *Azadi Bachao*: certificate of (Mauritian) tax residence conclusive
- From 1 April 2013, requirement to produce prescribed documents and information
- Same in Direct Taxes Code Bill 2013

Single Residence and SPVs

- Local residence requirements in SPV's state ("State A")
- LoB (if any)
- Certificate in State A
- Compliance requirements in other treaty state ("State B")
- To what extent can State B go behind certificate?
- Traps between residence on the one hand and substance / beneficial ownership issues on the other



Dual Residence Issues under Treaties

- OECD Model Article 4 (PoEM)
- Expanding PoEM: key management and commercial decisions
- Tiebreaker hierarchy
- Methods of resolution: advance rulings, domestic tie breakers (e.g. UK), practice guidance, other unilateral action
- MAP
- Certainty and speed of action

Tax Residence and Tax Treaties

- A person must be “a resident of a Contracting State” in order to obtain treaty benefits
- Abuse of tax residence leads to treaty abuse, i.e.:
 - Shopping into a tax treaty
 - Shopping between tax treaties
- BEPS Action 6 proposes inter alia:
 - Introduction of LoB and main purposes test
 - Introduction of SAARs (e.g. on dual resident companies (MAP) and PE in a third state)
 - Ensure that treaties do not prevent the application of domestic SAARs