- **Action by assessee**
  - If return furnished before APA signed → Submit modified return within 3 months from the end of the month in which APA was entered into.
  - if return furnished after APA Signed → Return to be filed as specified in APA
- **Action by A.O.**
  - Assessment completed for P.Y to which APA applies before filing of modified return → A.O. shall pass an order modifying total income of that P.Y within 1 year from the end of the F/Y in which modified return was furnished
  - Assessment pending for any P.Y to which APA applies on the date of modified return → A.O. shall complete the assessment as per APA, A.O. will get extra 1 year for completion of assessment.

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Sec 92D- Documents & Information to be maintained

(for 8 year & from the end of relevant A/Y)

If value of international transaction > ₹1 Cr., assessee is required to maintain the following information and documents-

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Local file	Master File	CBC
Details related to international transaction (Specified by CBDT i.e. TP study report)	Details related to international group (by constituent entity who is resident in India) as prescribed ↓ If Group revenue > ₹500Cr. + Aggregate value of international transaction (as per books) 1. during the year > ₹50 Cr. Or 2. if related to Purchase / sale / transfer / lease or use of intangible property during the year > ₹10Cr.	As per Sec 286 constituent entity will furnish information & documents as prescribed (Within time) ↓ (If group revenue > ₹6400 Crores)

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Note: - A.O. can ask assessee to furnish any information & document referred in TP study report (Local file) & it should be furnished within 30 days from the date of receipt of notice (Notice period can be extended for further 30 days)

Sec 92E CA report (TP audit report)

Submit to the department one month prior to due date of return u/s 139 (1) i.e. 31st October of A/Y (Form 3 CEB)

Penalties

Section	Default	Penalty
271AA	1. Failures to keep & maintain info & docs as Per Sec 92D 2. Fails to report transactions. 3. Fails to maintain / furnish correct info/ document. 4. Fails to furnish info & doc. (Master File)	2% of transaction Value ₹500000
271G	Failure to furnish info & documents as per Sec 92D	2% of transaction value
271BA	Failure to furnish report of CA as per Sec 92E	₹100000
270A	Failure to report any transactions would constitute 'misreporting of income'	Penalty of 200% of Taxes apply

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Note- However, the amount of underreported income represented by any addition made in conformity with the arm's length price determined by the TPO would not be included within the scope of underreported income under section 270A, where the assessee had maintained information and documents, as per 92D, declared the international transactions and disclosed all material facts relating to the transaction.

Sec 93- TRANSFER OF INCOME TO NON RESIDENTS

A resident and ordinarily resident is subject to tax in India in respect of his global income whereas in case of a non-resident and resident but not ordinarily resident, income accruing or arising outside India would not be taxable in his hands in India if it is not deemed to accrue or arise in India and is not received in India. Thus, in order to reduce his tax liability, a resident Indian may transfer the ownership in his foreign as set to a non-resident, while continuing to enjoy the benefits of income derived there from. Section 93 hits at such transactions which are effected with a view to avoiding income-tax liability. For the purpose of this section, the word "non-resident" also includes a person who is not-ordinarily resident.

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In order to attract the provisions of this section, the following conditions must be satisfied:

a. There should be a transfer of assets.
b. The said transfer may be made either alone or in conjunction with associated operations.
c. The transfer of assets is effected in such a manner that the income from transferred assets becomes payable to a non-resident.
d. As a consequence of the transfer, the transferor, either alone or in conjunction with associated operations, has acquired any right, by virtue of which he gets the power to enjoy the income from transferred assets, whether immediately or in future.
e. Such income of the non-resident transferee would have been chargeable to tax in India, had it been the income of the resident transferor.
f. The Assessing Officer is satisfied that avoidance of liability to tax in India is the purpose of the transfer.

In such a case, the income from transferred asset would be deemed to be the income of the resident transferor and would, accordingly, be taxable in his hands.

Sec 94 A- Special Provision in respect of transaction with person located in NJA

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CG may notify any country or territory outside India to be a notified Jurisdictional area (NJA).

If Assessee enters into transaction with any person located in NJA then:

- All the parties shall be deemed to be associated enterprises (as per 92A).
- The transaction shall be deemed to be an international transaction (as per 92B).
- The provision of Transfer pricing shall apply to Assessee (except tolerance band of 3%)
- Assessee have to submit documents & information required by IT Authority.
- If any payment made to person located in NJA then min. TDS rate will be 30%.
- If Assessee received any sum from person located in NJA then assessee have to offer explanation about the source of the fund in the hands of that person or in hands of beneficial owner (if that person is not beneficial owner).
  If assessee does not offer explanation or explanation is not satisfactory, then such sum shall be treated as income of assessee.

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Sec 94B- Limitation on interest deduction in certain cases

1. **Applicability: The provision shall be chargeable to an-**
   a) Indian company or
   b) A permanent establishment of a foreign company in India.
   Being the borrower who incurs expenditure by way of interest or similar nature in respect of any form of debt issued by a non-resident who is an 'associated enterprise' of the borrower. Provision given under this section would be applicable only where the expenditure by way of interest or of similar nature exceeds ₹1 Cr. In respect of any form of debt issued by a non-resident, being an 'associated enterprise' of such borrower.
2. Provision of guarantee deemed to be debt issued: Where the debt is issued by lender which is not an associated enterprise but an associated enterprise either
   a. Provides an implicit or explicit guarantee to such lender; or
   b. Deposits a corresponding and matching amount of funds with the lender,
   Such debt shall be deemed to have been issued by an associated enterprise.
3. The interest which is deductible, is lower of
   a) 30% of EBITDA; or
   b) Interest paid or payable to associated enterprise.
4. Business excluded from applicability of the provisions of section 94B: Taking into consideration the special nature of business of Banks and Insurance companies, an Indian company or permanent establishment of a foreign company which is engaged into business of banking or insurance have been excluded from the applicability of the provision of this section.

Sec 92BA- Specified Domestic Transactions

i. Any of the following transactions where the aggregate value of such transactions in the P.Y. is more than ₹ 20 crore.
ii. Inter-unit transfer of goods and services referred to in section 80A.
iii. Inter- unit transfer of goods or services referred to in section 80-IA (8).
iv. Business transacted between the assessee and his closely connected person referred to in section 80IA (10).
v. Transaction referred to in any other section of chapter VI-A or 10AA to which provisions of section 80IA (8) OR (10) apply.
vi. Business transacted between assessee and his closely connected persons referred to in section 115BAB (4).

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Any other transaction as may be prescribed.

Note- The above sections refer to transactions between eligible business / units (claiming deduction u/s 10AA or Income based deductions u/c VI-A or opting for concessional tax rates u/s 115BAB) and non-eligible business/units where the consideration for transactions does not correspond to the market value resulting in higher profits in the eligible business/units.

Master File (Rule 10 DA)-

It contains list of all entities of International group with their -

- Address
- Legal status of constituent entity
- Ownership structure
- Description of Business

↓

It will be submitted by constituent entity of international group if: -

1. Consolidated revenue > ₹500 Cr. (As per CFS for the Accounting year)
   And
2. Aggregate value of transactions (during the accounting year)
   a. > ₹50 Cr. or
   b. > ₹10 Cr. (In respect of transactions related to Intangible property)

Note- The rate of exchange will be TTBR on the last day of the accounting year for the calculation of value in INR of the consolidated group revenue.

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Special Note -

1. Information & Document to be furnished to JDIT designated by DGIT / PDGIT (system)in Form 3 CEAA on or before due date of filing of return

Form 3CEAA

- **Part A** → Always mandatory every year (Whether or not the limit specified above are satisfied)
- **Part B** → Mandatory if above limits are satisfied

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2. If there are more than one constituent entities in India, then one constituent entity submit Form 3 CEAA who is
   - Designated for this purpose, &
   - This information has been conveyed in Form 3CEAB to JDIT (at least 30 days prior to due date of furnishing Form 3 CEAA)
3. All document and information should be kept and maintained for 8 years from the end of A/Y.

CBC Report-

This report has complete details of International group including aggregate information of-

- Amount of Revenue
- Profit before Tax
- Income tax paid & accrued
- Total Capital
- Accumulated earnings
- Total No. of employees
- Tangible assets (not being cash or cash equivalent)
- Details of each constituent entity (including incorporation details)
- Nature of business of all constituent entities.

↓

Their report generally to be submitted by a parent entity of international group to the prescribed authority in its country of residence. This report is based on CFS of the group.

↓

If Parent entity/ alternate reporting entity is resident in India then they need to furnish the report in Form 3CEAD (within 12 months from the end of relevant accounting year)

↓

If Group Rev. > ₹6400 Cr.

Note- The rate of exchange will be TTBR on the last day of accounting year for the calculation of value in INR of the consolidated group revenue.

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Special Notes –

1 If parent entity / alternate reporting entity is non-resident in India

Resident constituent entity will not submit CBC report	Resident constituent entity will submit CBC report
If notified to the IT authority in Form 3CEAC (at least 2 months prior to due date of furnishing CBC report) stating that. ▸ Whether it is a alternate reporting entity or not OR ▸ Details of parent entity or alternate reporting entity & their resident country	If parent entity of the group is resident of a country and that country. a) Not obligated to file CBC report b) Does not have agreement with India for exchange of CBC report. c) Not exchanged information with India due to systematic failure. In case of (a) & (b) CBC report to be filed within 12 months from the end of the accounting year and in case of c within 6 months from the end of the month in which systematic failure has been intimated.

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2 If there are more than one resident constituent entities of the group, then group can nominate any of the constituent entity in Form 3 CEAE who will submit CBC report on behalf of the group.

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3 If the non-resident parent entity had designated an alternate entity for filing CBC report in the tax jurisdiction of the alternate entity & alternate entity has furnished such report on or before date specified by that country or territory, then the resident constituent entities would not be obliged to furnish the report if it can be obtained by Indian tax authorities under the agreement of exchange with that country.

- **Penalties for CBC report-**

Sec 271GB (1) / (3)- Penalty for Not furnishing report u/s 286

Period of Delay	Penalty
a) Up to a month	₹5000 Per day
b) Beyond one month	₹15000 per day after one month
c) Continuing default even after service of order levying penalty either under (a) or under (b)	₹50000 per day of continuing Failure beginning from the date of service of order

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Sec 271GB (2)- Penalty for Not furnishing information and documents

a) Failure to produce information before prescribed authority within the period allowed	₹5000 per day after such period Expires
b) Continuing default even after service of order levying penalty	₹50000 per day of continuing failure beginning from the date of service of order

Sec 271GB(4)- Penalty for submission of inaccurate information in the CBC report

If the reporting entity has provided any inaccurate information in the report, the penalty would be ₹500000 if-

a) The entity has knowledge of the inaccuracy at the time of furnishing the report but does not inform the prescribed authority; or

b) The entity discovers the inaccuracy after the report is furnished and fails to inform the prescribed authority and furnish correct report within a period of fifteen days of such discovery; or

c) The entity furnishes inaccurate information or document in response to notice of the prescribed authority

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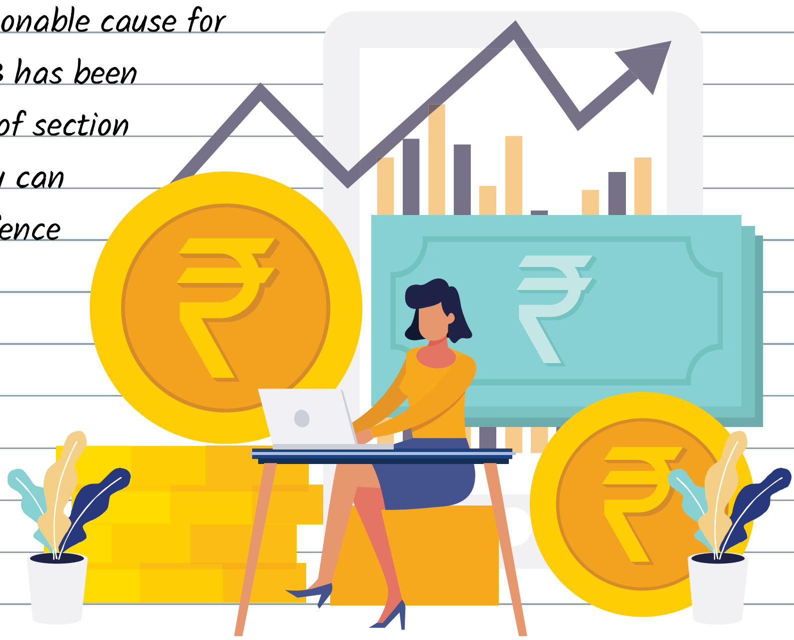
Sec 273B- Non-levy of penalty if reasonable cause for failure is proved

Section 273B provides for non-levy of penalty under various sections if the assessee proves that there was reasonable cause for such failure, Section 271GB has been included within the scope of section 273B. Therefore, the entity can offer reasonable cause defence for non-levy of penalties mentioned above.



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Notes

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NON-RESIDENT

Taxation on Non - Resident

- **Part i** → Residential Status and Scope of Total income
- **Part ii** → Tax on Income of Non-Resident
- **Part iii** → With-holding tax provision for Non-Resident
- **Part iv** → Presumptive Income of Non-Resident

RESIDENTIAL STATUS AND SCOPE OF TOTAL INCOME

- **Sec. 5** → Scope of Total Income
- **Sec. 6** → Res. Status of person
- **Sec. 7** → Income Deemed to be Recd. In India
- **Sec. 8** → Dividend Income
- **Sec. 9** → Income Deemed to accrue / arise in India

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Note - Income deemed to accrue or arise in India except person of eligible fund manager in India not to constitute business connection as per Sec.9A

As per Income Tax Act, tax will be imposed based on the Residential status of the Assesee during the Previous Year(PY), so we have to identify the residential status of every person to determine his taxable income and liability of tax.
Residential status will be determined for every person for each previous year independently.

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Sec. 5 – Scope of Total Income

Sec. 5 – Scope of Total Income

- **Indian Income** (Due or received in India)
- **Foreign Income** (Due and received outside India)
  - Other than Indian income
  - Taxable only for Resident

Due in India-

Income arise because of utilization of Indian Resources

OR

Received in India –

Income received first time in India

(whether due/arise outside or not)

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Taxable for all

(whether Res./Non-Res.)

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Sec. 6 – Determination of Residential Status

Determination of Residential Status

- Individual/HUF
  - Resident
    - ROR (Resident & Ordinarily Resident)
    - R but NOR (Resident but not Ordinarily Resident)
  - Non - Resident
- Others (Firm, Company, Local Authority, AOP/BOI and AJP)
  - Resident
  - Non - Resident

Note- Deemed resident will always be RNOR

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1\. **Residential Status of Individual**

- **Resident** (If fulfils any of the Basic - Condition)
  - **ROR** (If fulfils both the Additional Conditions)
  - **R but NOR** (Otherwise)
- **Non-Resident** (Otherwise)

A. Basic Conditions u/s 6(1)

1. Stay in India ≥ 182 days in PY

OR

2. Stay in India ≥ 60 days in PY
   \+
   Stay in India ≥ 365 days in 4 PPY → **Exception of this condition**

Exception 1 – 60 days substituted by 182 days in following cases –

a. Indian citizen leaving India for employment purpose in PY
b. Indian citizen leaving India as a crew member of Indian ship in PY
c. Indian citizen or Person of Indian origin engaged outside India in any employment or a business or profession, comes or visits India in PY

\+

His Total Income (other than foreign source) ≤ ₹15 lakh during the PY

Exception 2 – 60 days substituted by 120 days in following case –

Indian citizen or Person of Indian origin engaged outside India in any employment or a business or profession, comes or visits India in PY

\+

His total income (other than foreign source) > ₹15 lakh during the PY

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Note 1- Income from foreign source means

Income which accrue or arise outside India (Except the income derived abroad from business controlled from India or income derived abroad from profession set up in India).

Note 2- Person of Indian origin means

If he or either of his parents or either of his grandparents was born in undivided India.

Note 3- Entry date to India/Leaving date from India

The day on which he enters India, as well as the day on which he leaves India, shall be taken into account as stay of Individual in India

Note-4- In case of individual being a citizen of India, Member of the crew of a foreign bound ship leaving India, then Period to be excluded-

Period commencing from Date entered into continuous discharge Certificate in respect of joining the ship to period ending on date entered into continuous discharge certificate in respect of signing of the ship.

B. Additional Conditions u/s 6 (6)

1. Resident in India ≥ any 2 PY in any 10 PPY
2. Stay in India ≥ 730 days in 7 PPY

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Special Note 1

Indian Citizen/Person of Indian origin, engaged outside India in any employment or a Business or Profession, comes/visits India in PY

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+

Total Income (Other than foreign source income) > ₹15 Lakh in PY

+

Stay between 120 to 181 days

↓

Always R but NOR (No need to check additional condition)
(resident but not ordinarily resident)

Special Note 2

Deemed Resident (Added by FA 2020) – Always R but NOR

Indian Citizen

+

Total Income (other than foreign source income) > ₹15 lakh in PY

+

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Not liable to tax in any other Country/Territory (by reason of his domicile or residence or any other criteria)

↓

Will be treated as Deemed Resident [But he will be always R but NOR]

(Note- Deemed Resident provision will not apply if Individual is resident during the PY)

Liable to tax means that there is an income-tax liability on such person under the law of that country for the time being in force. It also includes a person who has subsquently been exempted from such liability under the law of that country.

2. Residential status of HUF

Residential status of HUF

- Resident (If Control & Management of its affairs Wholly or Partly situated in India)
  - ROR (If Karta of HUF fulfills both the additional conditions)
  - R but NOR (Otherwise)
- Non-Resident (Otherwise)

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3. Residential status of Firm/AOP/BOI/AJP

Residential status of Firm/AOP/BOI/AJP

- Resident If Control & management of its affairs is situated Wholly or Partly in India
- Non-Resident (Otherwise)

4. Residential Status of Company

Residential Status

- Indian Company (Incorporated as per Companies Act) → Resident
- Foreign Company
  - If POEM in India → Resident
  - Otherwise → Non-Resident

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POEM in India(circular no. 8/2017)
(Applicable only if T/O or Gross receipts > ₹50 cr. in P/Y)

↓

If both of the following conditions are fulfilled then POEM is outside India

↓

Co. is engaged in Active. Business outside India (ABOI) i.e. fulfills the ABOI test then POEM is outside India	Majority of the board meetings are held outside India

ABOI test means-all of the following conditions are satisfied-

- Passive income $\leq$ 50% of Total Income
- Less than 50% of its total assets situated in India
- Less than 50% of its total employees situated in India or resident in India
- Less than 50% of its total payroll expenses incurred for above employees

If ABOI test is not fulfilled-then POEM will be determined based on two stage process.

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Special Note -1

1. For ABOI test we need to consider average of the data of P/Y & last 2 PPY [Average of (P/Y + 2 Preceding P/Y)].

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2. If company has not been in existence for that long then data of period that the company has been in existence shall be considered.
3. If accounting year for tax purpose is in accordance with the laws of country incorporation of the company and is different from the P/Y then data of the accounting year that ends during the relevant P/Y and other 2 preceding accounting years shall be considered.

Example - If a company is incorporated in Singapore and they follow calendar year for tax purpose, then for the determination of residential status for the PY 2021-22 data of calendar year 2021, 2020 & 2019 shall be considered.

Special Note -2

In case the Board is not exercising its powers of management and such powers are being exercised by either the holding company or any other person, resident in India, then POEM shall be considered to be in India.

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Note- Merely BOD follows general & objective principles of global policy of the group in relation to pay roll, Accounting, HR, IT infrastructure and network platforms, Supply chain, Routine banking operational procedures etc. It would not constitute that BOD as standing aside & not exercising its powers. Provisions of GAAR can be triggered in cases where it is found to be used abusive/ aggressive tax planning.

Special Note -3 **Calculation of various factors, considered for ABOI Test**

Average of (PY + 2PPY)

- Passive Income → Total of Yearly Passive Income for $\frac{(PY + 2PPY)}{3}$
- Total Income → Total of Yearly Income for $\frac{(PY + 2PPY)}{3}$
- Employee → Total of Yearly Employees $\frac{(PY + 2PPY)}{3}$
- Payroll Expenses → Total of Yearly Payroll Exp. for $\frac{(PY + 2PPY)}{3}$
- Assets → Total of Yearly Assets for $\frac{(PY+2PPY)}{3}$

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- Average passive income = $\frac{\text{Total yearly passive income } (P/Y + 2PPY)}{3}$

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→ Yearly passive income includes –

Income from
- Rent
- Capital Gain
- Royalty
- Dividend
- Interest (except banking business)

→ Income from transaction of sale & purchase with Associate Enterprise (AE) only, i.e. where both purchase & sale is from / to its Associated Enterprise.

(Note-Income will be taken as per tax law of country of incorporation. If Tax law does not require computation of income, then income as per Books of Accounts.)

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- **Average value of Assets** = $\frac{\text{Total yearly value of assets (P/Y + 2PPY)}}{3}$

Yearly value of assets

→ Depreciable Assets → Average of Opening & Closing WDV (Op. WDV + Cl. WDV / 2)

→ Non-depreciable assets → Value as per books of accounts

- **Average No. of Employees** = $\frac{\text{Total of Yearly Employees (P/Y + 2PPY)}}{3}$

Yearly employees = $\frac{\text{Opening employee + Closing employee}}{2}$

(Employees include ON-ROLL as well as CONTRACTUAL who perform similar tasks which are performed by on-roll employees)

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- **Average of Payroll expenses** = $\frac{\text{Total of Yearly Payroll expenses (P/Y + 2PPY)}}{3}$

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Yearly Expenses = Actual expenses incurred for the year (including salary, wages, bonus & all other compensation including related pension and social cost borne by employer).

2. If ABOI test not fullfilled-Two stage process

First Stage → **Identify the persons who actually make the key management and commercial decisions for conduct of company's business as a whole.**

Second Stage → **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.**

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Guiding Principal – Some of the guiding principles which may be taken into account for determining the POEM are as follows-

S.NO.	SITUATION	POEM
1.	Where the BOD – a.) exercise its authority to govern the company & b.) make the key management and commercial decisions (in substances)	Location where board meetings are held for key decisions
2.	Powers are delegated by the Board to the executive committee consisting of key member of Senior management	Location of executive committee
3.	a.) where senior management & their support staff are based (principal place of business) b.) If decentralized company (where senior management operates offices in various countries)	Such Principal place of business (Head office) Location where senior management → Are primarily or predominantly based or → Normally return to following travel to other locations or → Meet, when formulating or deciding key strategies and policies for the company as a whole.
4.	Decisions may be taken without any physical presence	Location where directors and key management person resides
5.	Decisions are taken by circular resolution	Location of person who has authority to pass circular resolution
6.	Decisions are taken by shareholder (e.g. dissolution, liquidation, etc)	These decisions are for the existence of company, not for the management of the company, so shareholder's location will not be considered for determining the POEM

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CBDT vide Circular no. 8/2017 clarifications-

Example 1 Company A Co. is a sourcing entity, for an Indian multinational group, incorporated in country X and is 100 % subsidiary of Indian company (B Co.). The warehouses and stock in them are the only assets of the company and are located in country X. All the employees of the company are also in country X. The average income wise breakup of the company's total income for three years is-

- i 30 % of income is from transaction where purchases are made from parties which are non - associated enterprises and sold to associated enterprises;
- ii 30 % of income is from transaction where purchases are made from associated enterprises and sold to associated enterprises;
- iii 30 % of income is from transaction where purchases are made from associated enterprises and sold to non - associated enterprises and
- iv 10 % of the income is by way of interest.

Interpretation-In this case, passive income is 40 % of the total income of the company. The passive income consists of-

- i 30 % income from the transaction where both purchase and sale is from / to associated enterprises; and
- ii 10 % income from interest.

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The A Co. satisfies the first requirement of the test of active business outside India. Since no assets or employees of A Co. are in India the other requirements of the test is also satisfied. Therefore, company is engaged in active business outside India.

Example 2 The other facts remain same as that in Example 1 with the variation that A Co. has a total of 50 employees 47 employees, managing the warehouse, store keeping and accounts of the company, are located in country X. The Managing Director (MD) Chief Execu tive Officer (CEO) and sales head are resident in India. The total annual payroll expenditure on these 50 employees is of ₹5 cr. The annual payroll expenditure in respect of MD, CEO and sales head is of ₹3 cr.

Interpretation- Although the first limb of active business test is satisfied by A Co. as only 40 % of its total income is passive in nature. Further, more than 50 % of the employees are also situated outside India. All the assets are situated outside India. However , the payroll expenditure in respect of the MD , the CEO and the sales head being employees resident in India exceeds 50 % of the total payroll expenditure. Therefore , A Co. is not engaged in active business outside India .

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Example 3 The basic facts are some as in Example 1. Further facts are that all the directors of the A Co. are Indian residents. During the relevant previous year 5 meetings of the Board of Directors is held of which two were held in India and 3 outside India with two in country X and one in country Y

Interpretation: The A Co. is engaged in active business outside India as the facts indicated in Example 1 establish. The majority of board meetings have been held outside India. Therefore, the POEM of A Co. shall be presumed to be outside India.

Example 4 The facts are some as in Example 3 but it is established by the Assessing Officer that although A Co.'s senior management team signs all the contracts for all the contracts above ₹10 lakh the A Co. must submit its recommendation to B Co. and B Co. makes the decision whether or not the contract may be accepted. It is also seen that during the previous year more than 99 % of the contracts are above ₹10 lakh and over past years also the same trend in respect of value contribution of contracts above ₹10 lakh is seen.

Interpretation- These facts suggest that the effective management of the A Co. may have been usurped by the parent company B Co. Therefore, POEM of A Co. may in such cases be not presumed to be outside India even though A Co. is engaged in active business outside India and majority of board meetings are held outside India.

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Example 5 An Indian multinational group has a local holding company A Co. in country X. The A Co. also has 100 % downstream subsidiaries B Co. and C Co. in country X and D Co. in country Y. The A Co. has income only by way of dividend and interest from investments made in its subsidiaries. The Place of Effective Management of A Co. is in India and is exercised by ultimate parent company of the group. The subsidiaries B, C and D are engaged in active business outside India. The meetings of Board of Director of B Co., C Co. and D Co. are held in country X and Y respectively.

Interpretation- Merely because the POEM of an intermediate holding company is in India, the POEM of its subsidiaries shall not be taken to be in India. Each subsidiary has to be examined separately. As indicated in the facts since B Co., C Co., and D Co. are independently engaged in active business outside India and majority of Board meetings of these companies are also held outside India. The POEM of B Co., C Co., and D Co. shall be presumed to be outside India.

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Consequences of Foreign Company having POEM in India (Transition Provisions u/s 115 JH) (as per Notification No. 29/2018)

In case of a foreign company, which is treated as a resident in India for the first time due to POEM, then provision of this act relating to computation of total income, treatment of unabsorbed depreciation, set off and carry forward of losses, collection, recovery and special provision relating to avoidance of tax will apply with such exception, modification and adaptions as notified by the Central Government (Notification No. 29/2018)

If assessee does not fulfill conditions, as provided by the central Government, to obtain the benfits of the transition provisions, then benefits so provided due to transition provisions shall stand withdrawn and A.O shall recompute the income according to normal provisions.

for computation of rectification time limit, A.O will get 4 years from the end of FY in which conditions were violated.

Due to transition assessee needs to follow/implement following things as per Notification No. 29/2018

- A. Books of Accounts
- B. Previous year income (Brought forward and set-off of losses for PPY)
- C. Tax Provision

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A) Books of Accounts (Balance Sheet and P&L Account)

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If accounting year ends on 31st March (as per Indian accounting year)

Books of accounts required to be maintained as per accounting year

If accounting year does not end on 31st March (not as per Indian accounting year)

Foreign company required to prepare Balance sheet and P&L

Before the P/Y in which it becomes Resident

For the period commencing from the date on which the accounting year commences, till 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 a resident.

On or after the P/Y in which it becomes Resident

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 it's POEM

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Note: - Determination of Opening WDV

Foreign company

- Assessed to Tax (In foreign jurisdiction)
  - If depreciation considered for computation of taxable income
    ↓
    WDV as on 1st April as per tax record in foreign country
  - If depreciation not considered for computation of taxable income
    ↓
    WDV as on 1st April assuming that depreciation is actually allowed.
- Not assessed to Tax (In foreign jurisdiction)
  - WDV as on 1st April of PY in which foreign company becomes resident (due to POEM) as per Books of Accounts maintained as per law of that foreign jurisdiction.

B) Previous year income (Effect of Brought forward losses and Unabsorbed Depreciation)

Benefit of brought forward losses and unabsorbed depreciation is available, so amount of such B/F losses and unabsorbed depreciation will be considered as below-

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Foreign company

- Assessed to Tax (In foreign jurisdiction)
  ↓
  As on 1st April as per foreign tax records
- Not assessed to Tax (In foreign jurisdiction)
  ↓
  As on 1st April as per books of accounts as per law of foreign country

Note 1. Brought forward losses of foreign company can be allowed under Income Tax Act only for balance period.

Example: - If unabsorbed business loss occurred in the hands of the foreign company in A/Y 2019-20 and such loss has not been set-off subsequently and the foreign company's POEM was found to be in India in A/Y 2022-23, then such business loss shall be available for carry forward only for the remaining period out of 8 A/Y commencing from A/Y 2020-21 in terms of section 72 i.e. such loss can be set –off in A/Y 2022-23 to A/Y 2027-28.

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Note 2. Such brought forward loss and unabsorbed depreciation of foreign company can be setoff with only such income which has become taxable in India because of POEM (Indian income, which will be taxable even when foreign company becomes resident or not, then such brought forward losses can't be set off against such Indian income)

Note 3. For the purpose of carried forward of losses, if accounting year of foreign company does not end on 31st March and -

Period starting from

Start date of accounting year up to 31st March (Before the P/Y in which foreign company becomes resident) > 6 months	Start date of accounting year up to 31st March (Before the P/Y in which foreign company becomes resident) > 6 months
↓ treated as separate year E.g., If accounting year is from 01st August to 31st July and company becomes resident in India during P/Y 22-23, then company is required to prepare P&L and B/S for the period 01-08-2021 to 31-03-2022 and also for 01-04-2022 to 31-03-2023. Since the period is more than 6 months, it is to be treated as separate accounting year.	↓ it will included in earlier accounting year E.g., If accounting year is calendar year(Jan to Dec) and company becomes resident in India during P/Y 22-23, then company is required to prepare P&L and B/S for the period 01-01-2022 to 31-03-2022 and also for 01-04-2022 to 31-03-2023. Since the period is less than 6 months i.e. 1st January to 31St March, it is to be included in the accounting year immediately preceding the accounting year in which foreign company becomes resident i.e. from 01-01-2022 to 31-03-2023 (total 15 months)

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Note 4. In case of different accounting year is followed, then losses/depreciation will be allocated on proportionate basis.

Example (A) - The accounting year followed by the foreign company is 1st January to 31st December. The company becomes resident in India on account of POEM in P/Y 22-23.

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 1-1-2022 to 31-03-2022.**

Loss as per tax records in foreign country-

01-01-2021 to 31-12-2021	₹100 lakh
01-01-2022 to 31-12-2022	₹200 lakh

Now, loss for P/Y 31-03-2022 shall be taken to be ₹100 lakhs + ₹200 x 3/12 = ₹150 lakh.

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Example (B) - The accounting year followed by the foreign company is 1st July to 31st June. The company becomes resident in India on account of POEM in P/Y 2022-23.

Loss as per tax records in foreign country-

01-07-2020 to 30-06-2021	₹100 lakh
01-07-2021 to 30-06-2022	₹200 lakh

Now, loss of accounting year 01-07-2021 to 31-03-2022 is ₹200 x 9/12 = ₹150 lakh

C) Effects related to various Tax Provisions

TDS Provision

Where more than one provision of TDS Chapter applies to the foreign company as resident as well as foreign company, the provision applicable to the foreign company alone shall apply. Compliance to those provisions of TDS Chapter of the Act as are applicable to the foreign company prior to it becoming Indian resident shall be considered sufficient compliance to the provisions of said Chapter. The provisions of section 195 (2) relating to application to Assessing Officer to determine the appropriate proportion of sum chargeable to tax shall apply in such manner so as to include payment to the foreign company .

Tax Credit

Foreign Co. is eligible for the relief / deduction of foreign taxes paid as per Sec 90 or 91 of the Act (DTAA).

Tax Rate

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 i.e. , 40 % 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.

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Special Note-

1. **Non - applicability of the notification** -This notification does not apply to the income of foreign company which was taxable in India even if foreign company had not become a resident.
2. **No effect on other transactions** -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.
3. **Applicability of other Provisions relating to Foreign Company**- Subject to the above exceptions, modifications and adaptions specifically provided vide this notification, the foreign company shall continue to be treated as a foreign company even if it is said to be resident 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 ;
   (ii) non - resident persons, shall not apply to it ; and
   (iii) the provisions specifically applicable to resident, shall apply to it .
4. **Meaning of foreign jurisdiction** - The place of incorporation of the foreign company.

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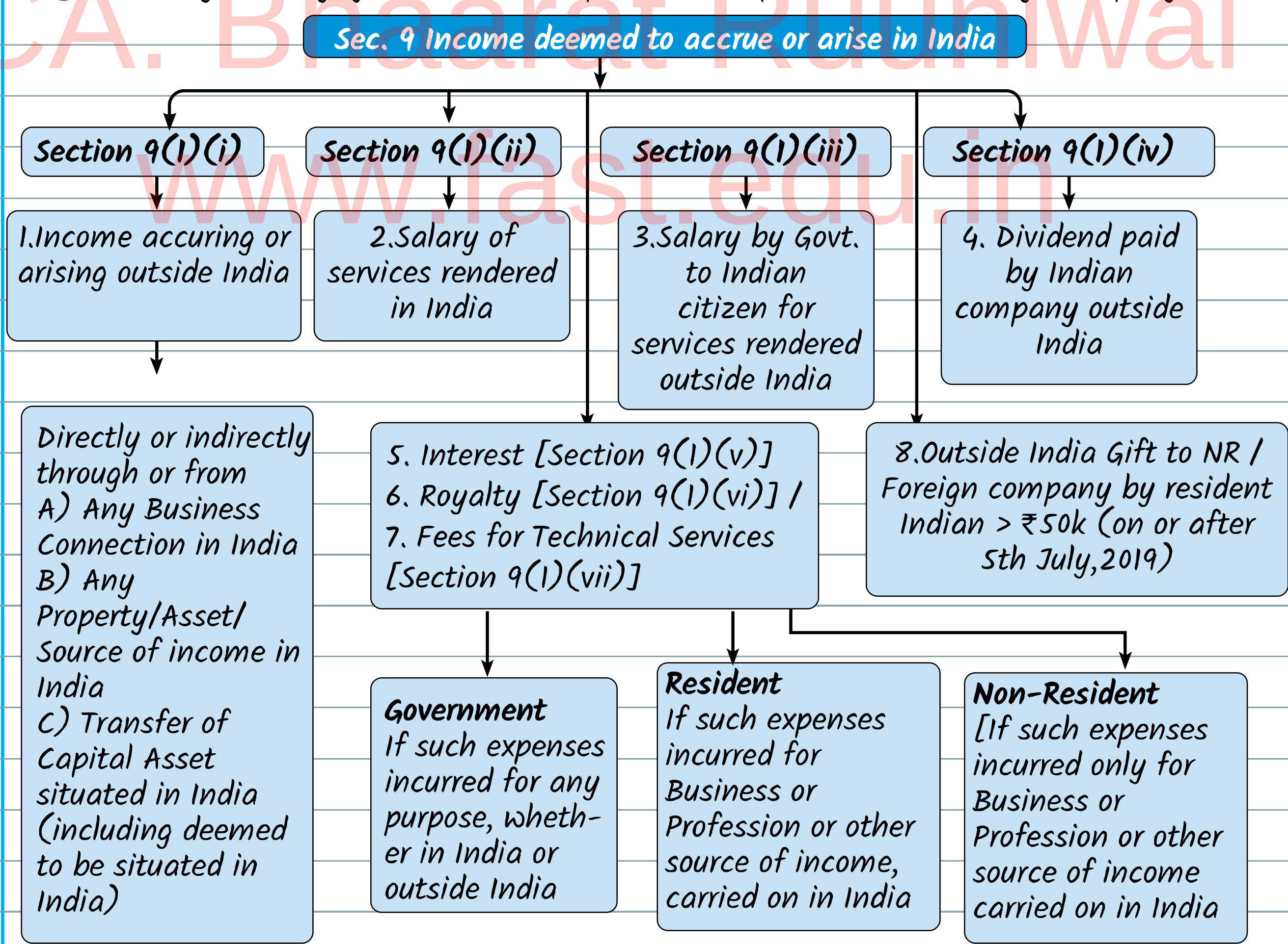

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