

Rethinking the POEM Tie-Breaker Rule in Tax Treaty Law

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1. Dual Residence

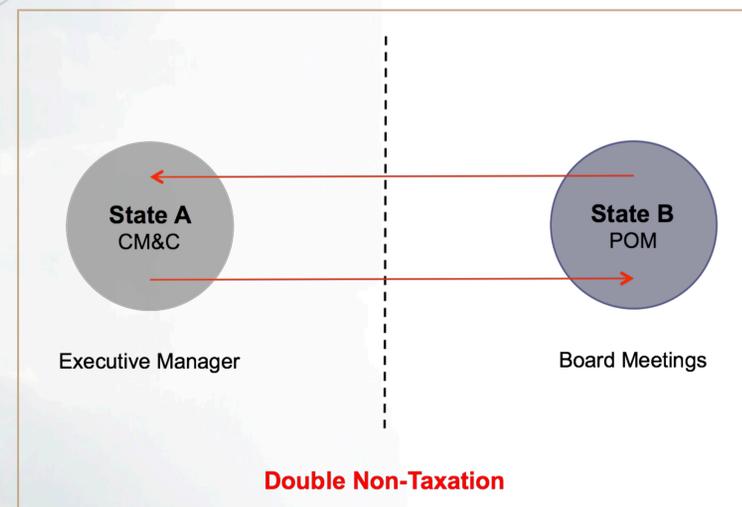
For tax treaty purposes, residence is defined by reference to the domestic laws of the contracting states. As a result, dual residence may arise when two contracting states (i) use different criteria or (ii) use similar criteria but interpret them differently.

2. POEM as a Tie-Breaker Rule

Dual residence often leads to double taxation as both states consider themselves the state of residence. It is, however, a fundamental principle of the OECD Model that a person can only be a resident of one contracting state. To resolve this conflict, Article 4(3) of the OECD Model provides a tie-breaker. It states that a dual resident company is deemed to be resident only in the state in which its 'place of effective management' (POEM) is situated.

3. POEM - Interpretation

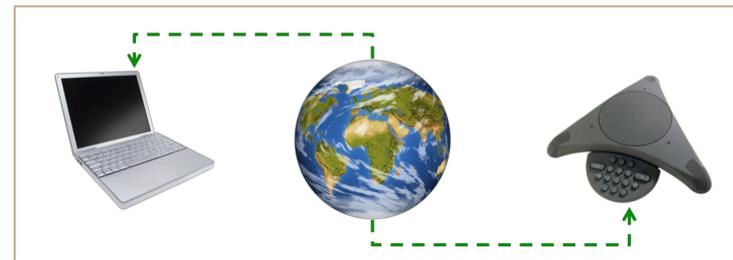
The POEM concept has not been satisfactorily defined in the OECD Model or the accompanying OECD Commentary. As a consequence, countries continue to interpret the concept on the basis of Article 3(2) of the OECD Model, i.e. in accordance with their domestic laws. This has led to the emergence of divergent approaches in state practices, with two main views dominating the debate: the Anglo-Saxon concept of "central management and control" and the continental European concept of "place of management".



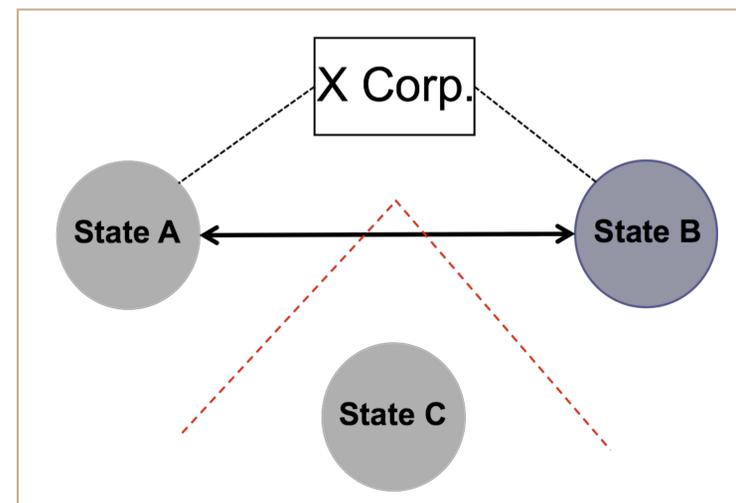
4. POEM - Limits

Even if the POEM was given an autonomous meaning, the tie-breaker would have limits and could not be applied in various cases:

A) Virtual offices



B) Triangular cases



5. POEM - Possible Alternatives

Upon closer examination, the following options have to be considered:

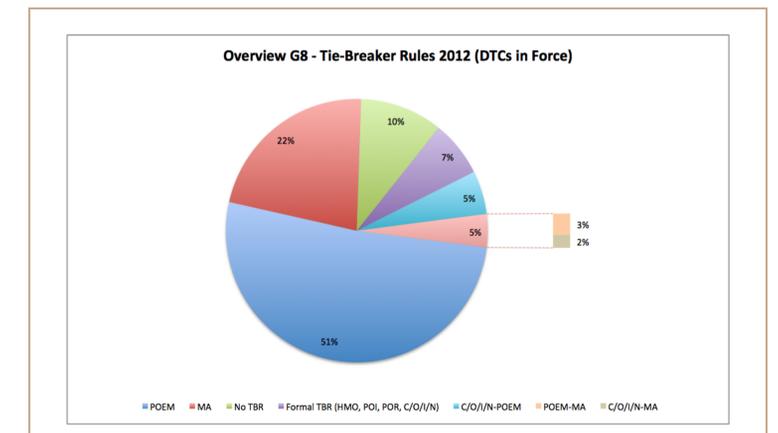
- Should the concept of residence be changed (Article 4(1) of the OECD Model)?
- Should the POEM test be replaced with a purely formal criterion?
- Should the company's *economic nexus* be placed at the forefront? If yes, how should the nexus be evaluated?

- Would an integrated solution only be possible by combining factual and formal tests, i.e. a *hierarchy of tests*?
- Or should the pursuit of mutual agreement or arbitration proceedings be the last resort?

6. Trends and Developments in Tax Treaty Practices - Empirical Evidence

Despite the addition of the mutual agreement procedure (MAP) to the OECD Commentary, and the predominant view in the tax literature that MAP has already replaced POEM, the empirical study upon which this thesis is based has demonstrated that the POEM tie-breaker continues to play a crucially important role in solving dual residence.

The G8 member states comprise the eight leading industrial nations: Canada, France, Germany, Italy, Japan, the Russian Federation, the UK and the United States. As of 2012, their tax treaty network comprised a total of 720 tax treaties.



This pie chart clearly shows that the POEM tie-breaker is of paramount importance; more than 50 per cent of the tax treaties follow the OECD Model and adopt this criterion. However, even more striking is the fact that the POEM tie-breaker outnumbers the group of 'best efforts' rules by almost two and a half to one. Put differently, the POEM test is used in more than twice as many tax treaties as those containing MAP (22 per cent).