



## Place of effective management: SARS' views

Place of effective management (POEM) remains a key determinant of the South African tax residence of juristic persons. This is the case despite it no longer being the tie-breaker in the OECD Model Tax Convention to resolve dual residence. SARS recently revised Interpretation Note 6, which deals with POEM. This article considers the continued role of POEM, the core principle in IN6 as well as the changes to the note.

Place of effective management ('POEM') is critical in determining the South African tax residence of persons other than natural persons. SARS recently published Issue 3 of [Interpretation Note 6](#) ('IN6'), which deals with POEM. This article considers the continued relevance of POEM, the core principles in IN6 and highlights its changes.

### Role of place of effective management

Persons other than natural persons are considered tax residents of South Africa if (a) incorporated, established or formed in South Africa or (b) has their POEM in South Africa. Entities incorporated in foreign jurisdictions but considered residents in South Africa based on their POEM being in South Africa often face dual residence.

Before the amendments in 2017, POEM was the tie-breaker in the OECD Model Tax Convention ('MTC') and most of South Africa's treaties to resolve dual residence.

Following the OECD/G20 BEPS Project, the tie-breaker in the OECD MTC was amended for dual residence to be resolved by mutual agreement. POEM is one of the factors to consider, but no longer the only one. Some of South Africa's more recent treaties already contain the revised tie-breaker, for example, the tax treaty with Mauritius. Article 4 of the BEPS multilateral instrument (MLI) could replace the tie-breaker provision in existing treaties with the revised one. This depends on whether the treaty is a covered tax agreement and the contracting states' Article 4 elections.

### Core principles in IN6

The core principle in IN6 remains unchanged, even though the supporting commentary no longer appears in the OECD's MTC following the amendment of the tie-breaker. This is, in paragraph 4.1. of IN6:

'A company's place of effective management is the

place where key management and commercial decisions necessary for the conduct of its business as a whole are in substance made. This approach is consistent with the OECD's commentary on "place of effective management"

Most of the views expressed by SARS in the note also remain unchanged.

### Changes to IN6

One may gain insight into developments affecting POEM that SARS encounter in practice from the limited changes made to IN6.

The new content added to IN6 relates to the impact of modern technology and travel on an entity's POEM. IN6 continues to state that these technologies may have the effect that the absence of physical board meetings or the use of technology during physical board meetings could result in the place where persons with overriding decision-making powers reside being different from the meeting location. IN6 now includes guidance from the OECD highlighting difficulties in identifying any particular location as an entity's POEM or that may cause enterprises to have a mobile POEM. SARS, therefore, indicates that the physical place of a meeting should not bear undue weight. The surrounding facts and circumstances are important.

The impact of round-robin decision-making now has a separate section in IN6. This possibly suggests an increase in its relevance in POEM assessments.

Finally, IN6 also contains a section on the impact of temporary measures resulting from the COVID-19 pandemic. SARS refers to the OECD's view that temporary or extraordinary changes should not affect POEM. By implication, longer-term and more permanent changes resulting from the pandemic may, however, do. SARS states that the merits of each case must be considered to determine a company's POEM.

