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Corporate Nationality and Residence in Cross-Border Business

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Abstract Cross-border business has made corporate nationality and tax residence more complex than the simple question of where a company is incorporated. A company may be registered in one jurisdiction, managed from another, owned by investors from several countries, and earn income across many markets. This article distinguishes corporate nationality from fiscal residence and examines the Indian legal framework, including the separate legal personality of companies, the place of effective management test, tax treaties, and leading judicial decisions. It argues that incorporation remains a useful legal connecting factor, while substantive management and economic activity are relevant to tax residence and anti-avoidance analysis. The article recommends clearer evidence-based guidance, consistent treaty interpretation, and proportionate compliance rules to reduce uncertainty without discouraging legitimate foreign investment.

Index Terms Corporate nationality, cross-border business, international taxation, place of effective management, tax residence.

I. INTRODUCTION

Companies increasingly operate through multinational groups, digital platforms, holding entities and subsidiaries incorporated in different jurisdictions. This structure creates a deceptively simple question: which country should be treated as the company's legal home? The answer matters for taxation, treaty protection, regulatory supervision, access to courts, investment screening and corporate obligations. Yet "nationality" and "residence" are not interchangeable concepts. A company's nationality commonly identifies its legal connection with a state, often through incorporation. Residence, especially for tax purposes, asks where the company is treated as resident under domestic law and applicable treaties.

The distinction becomes important when legal form and commercial reality diverge. A company incorporated abroad may have its senior executives, strategic decision-making and effective control in India. Conversely, an Indian-incorporated company may conduct most of its operations overseas. A workable legal framework must respect corporate personality while preventing artificial arrangements designed only to obtain tax advantages. This article analyses that balance, with particular attention to Indian law and judicial reasoning.

II. CONCEPTUAL DISTINCTION

A. Corporate nationality

Nationality should not be confused with the nationality of the persons who own or manage the company. A company incorporated under the law of State X ordinarily derives its legal existence from that law, even if its shareholders are Indian citizens or its products are sold mainly in India. Conversely, foreign shareholders do not automatically make an Indian-incorporated company a foreign company. The relevant legal rule may, however, examine ownership or control for a specific regulatory purpose, such as foreign-investment restrictions or security screening. The connecting factor must therefore be selected by reference to the question being decided.

Corporate nationality is a legal connecting factor used to associate an incorporated entity with a state. Incorporation is generally the clearest starting point because it identifies the law under which the company was created and by which its internal constitution is governed. Other systems may also consider the registered office, central management or control, depending on the legal question. Shareholders' citizenship does not automatically become the company's nationality: a company has a separate legal personality distinct from its members.

Residence is also not a universal label that necessarily produces the same result under every legal regime. Tax residence is determined by the domestic legislation applicable to the relevant year, subject to any applicable treaty. A company may be incorporated in one state and treated as resident in another for tax purposes. It may also face competing residence claims if each state applies a different domestic test. The consequences depend on the scope of each state's taxing jurisdiction and the relief available under the relevant treaty.

In State Trading Corporation of India Ltd. v. Commercial Tax Officer [1], the Supreme Court held that a company is not a "citizen" for the purpose of claiming rights reserved by Article 19 of the Constitution. The decision is not a complete code for every question of corporate nationality, but it demonstrates a central principle: corporate personality and the citizenship of shareholders are legally distinct. Thus, ownership by Indian citizens or even by the State does not, by itself, transform the company into a constitutional citizen.

B. Corporate residence

Residence is context-dependent. For tax purposes, it determines whether a jurisdiction may tax a company as a resident, often on a broader base of income than it taxes non-residents. Residence is therefore a statutory and treaty question rather than a universal status. A company can be incorporated in one country and be treated as tax-resident in another if the applicable law uses management or effective-control criteria.

The distinction may be illustrated by a company incorporated in State X whose board meets there only formally, while its chief executives in India decide budgets, acquisitions, financing and business strategy. Incorporation may continue to link the company to State X under company law, but India may separately examine whether the company is resident for tax purposes under its domestic test. This is not necessarily a contradiction: different legal rules answer different questions.

III. THE INDIAN LEGAL FRAMEWORK

A. Incorporation and separate legal personality

The central concern is the location of decision-making for the entity as a whole, rather than the location of every employee or every operational activity. For example, a foreign-incorporated company may employ staff and maintain a registered office overseas, while its senior executives in India determine the annual budget, major acquisitions, financing and overall commercial strategy. Those facts may support closer examination under POEM. By contrast, if the Indian team merely implements a strategy genuinely formulated and controlled abroad, its operational importance alone may not establish that effective management is in India. The conclusion must follow the evidence and the applicable legal standard.

Relevant evidence may include board papers circulated before meetings, the identity of persons proposing and

approving major transactions, delegated-authority documents, correspondence with advisers, financing approvals and the actual conduct of directors. Formal minutes are useful but not decisive when they do not reflect how decisions were reached. Equally, the fact that a senior officer is physically present in India does not by itself establish POEM if that person lacks authority over the company's key decisions. A fair assessment should consider the pattern of decision-making over time and avoid relying on a single isolated meeting or document.

The Companies Act, 2013 governs incorporation and the legal status of companies registered in India, while foreign companies carrying on business in India may attract the Act's provisions relating to foreign companies, subject to the statutory conditions. Incorporation creates a legal person distinct from shareholders, capable of holding property, entering contracts and suing or being sued. This principle, classically associated with Salomon v. A. Salomon & Co. Ltd. [2], supports commercial certainty by separating company liabilities from those of members, subject to recognised exceptions.

For cross-border analysis, incorporation is an administrable starting point, but it cannot alone answer every tax or anti-avoidance issue. Nor should foreign ownership automatically be equated with foreign residence. The proper inquiry depends on the legislation, the relevant tax year, the treaty and the facts established by evidence.

A DTAA generally allocates or limits taxing rights and provides mechanisms intended to reduce double taxation; it does not necessarily determine every aspect of corporate nationality or domestic company status. Where a company is regarded as resident in both contracting states, the treaty text applicable to that particular relationship must be examined. Some treaties contain a specific place-of-effective-management tie-breaker, while others may require the competent authorities to resolve the issue by mutual agreement. It is therefore unsafe to assume that one treaty's wording can be applied to all treaties.

B. Place of effective management

For tax years governed by the Income-tax Act, 1961, section 6(3) treated a company as resident in India if it was an Indian company or its place of effective management (POEM) was in India. POEM means the place where key management and commercial decisions necessary for the conduct of the business of the entity as a whole are, in substance, made [3]. The test looks beyond formal labels and asks where the real strategic direction occurs.

Remote working makes the inquiry more complex because directors may participate from different countries and electronic approval systems may record only the final authorisation. A video conference's physical location, the place where minutes are typed, or the location of a server may not reveal where substantive authority was exercised. Investigators should distinguish between discussion, recommendation, approval and implementation. The strongest conclusion will usually emerge from the combined evidence of who exercised real decision-making power, where that power was exercised and whether the arrangement was consistent with the company's actual conduct.

The Central Board of Direct Taxes' Circular No. 6 of 2017 provides guiding principles for applying POEM. It discusses active business outside India and, in other cases, a two-stage inquiry: identifying the person or persons who actually make key management and commercial decisions, and then determining where those decisions are in fact made [4]. Board-meeting locations may be relevant, but should not be treated as conclusive where minutes are ceremonial and decisions are made elsewhere.

Commercial substance should be assessed contextually. A holding company may legitimately coordinate investments, raise capital, manage group risk or oversee joint ventures without maintaining a large workforce. At the same time, a company that claims treaty benefits but has no meaningful authority over its investments may attract scrutiny under applicable law. The absence of employees or physical premises is a relevant fact in some circumstances, not an automatic finding of abuse. The inquiry should consider the entity's stated function, actual activities, decision-making authority, contractual obligations and the applicable treaty's requirements.

From 1 April 2026, the Income-tax Act, 2025 applies to the relevant tax years within its commencement framework. Section 6 retains the core company-residence test: an Indian company, or a company whose POEM is in India, is resident in India [5]. The applicable enactment must therefore be identified by tax year; the 1961 Act remains relevant to earlier periods, even where assessment proceedings occur later.

C. Tax treaties and cross-border allocation

A central challenge is balancing substance-based scrutiny with legal certainty. POEM can prevent an entity from relying solely on overseas incorporation where its real strategic management is located in India. However, a broad or inconsistent application may blur the distinction between high-level management and ordinary operational work. The test should not become a presumption that every foreign company with Indian employees is Indian-resident, nor should formal board meetings abroad conclusively establish foreign residence. The quality, consistency and context of the evidence are therefore critical.

An evidence-based framework should also recognise modern governance arrangements, including delegated authority, independent directors, regional executives and decisions made through secure digital systems. Authorities should identify the key decisions relevant to the business and examine who had the practical power to make or veto them. Companies, in turn, should maintain contemporaneous records that accurately reflect the decision process, rather than preparing documents solely after a tax inquiry begins. Such records improve accountability for both the taxpayer and the administration.

Where two states claim residence, effective communication between competent authorities can reduce inconsistent outcomes. Mutual agreement procedures should be accessible, transparent in their process and concluded within a reasonable period where practicable. Administrations should explain the material factors supporting their conclusions, subject to legitimate confidentiality restrictions. Proportionate compliance obligations are also important: a small entity should not face the same documentation burden as a complex multinational group, although the underlying legal test must remain consistent.

Finally, the analysis should proceed in three stages. First, identify the company's legal status and the law under which it was incorporated. Second, determine residence under the domestic tax law applicable to the relevant period, including the POEM test where applicable. Third, examine the text and conditions of any relevant treaty, including residence tie-breakers and entitlement to benefits. This sequence helps prevent a conclusion on one issue from being mistakenly treated as decisive of all the others.

Domestic residence rules operate alongside double taxation avoidance agreements (DTAAs). A company may meet residence criteria in more than one jurisdiction, creating the risk of overlapping claims. Treaty provisions and the relevant treaty's tie-breaker mechanism must be examined before concluding which state may tax particular income. Treaty text varies; it is unsafe to assume that every agreement uses the same test or that a single factor resolves all conflicts.

The approach proposed in this article does not seek to privilege form over substance or substance over form in every case. Instead, it requires the correct legal question to be asked and answered on reliable evidence. Incorporation provides an important and administrable legal anchor, while tax residence rules respond to the possibility that effective management may occur elsewhere. Clear guidance, accurate records, treaty-sensitive interpretation and timely dispute resolution can protect revenue without treating legitimate cross-border structures as inherently suspect.

Treaty access also raises questions about beneficial ownership, commercial substance and treaty shopping. In Union of India v. Azadi Bachao Andolan [6], the Supreme Court considered the validity of measures concerning the India–Mauritius tax treaty and recognised the role of treaty arrangements in attracting investment, while the case continues to frame debates over treaty abuse. In Vodafone International Holdings B.V. v. Union of India [7], the Court examined an offshore share transfer involving an Indian business and emphasised the need to analyse the transaction and statutory language as a whole. These decisions concern different legal issues; neither should be reduced to a universal rule that form always prevails or that economic substance always overrides form.

IV. PRACTICAL DIFFICULTIES IN CROSS-BORDER BUSINESS

A. Split management and remote decision-making

Modern groups rarely make every decision in one place. Directors may join meetings remotely, senior managers may work across time zones, and strategic authority may be distributed between a parent company and local subsidiaries. The location of a video call is not necessarily the location of effective management. Relevant evidence may include who prepared and approved proposals, who had authority to reject them, where negotiations were directed, and where the company's overall strategy was settled.

B. Holding companies and economic substance

Holding companies can serve legitimate functions, including investment pooling, financing, risk allocation and joint-venture governance. Yet an entity with little independent activity may be challenged where its jurisdiction appears selected primarily to obtain treaty benefits. A sound analysis should distinguish genuine commercial structuring from arrangements lacking meaningful decision-making or business rationale. Neither low staffing nor a holding-company function should automatically prove abuse; the full facts and applicable legal standards remain decisive.

C. Double taxation and compliance costs

Conflicting residence claims can expose a company to audits, additional tax, interest, penalties and expensive mutual-agreement procedures. Groups may have to maintain overlapping records and explain the same decisions to different tax authorities. Smaller enterprises are particularly affected because they lack the compliance teams of multinational corporations. Unclear standards can also discourage investment where businesses cannot predict the tax consequences of locating senior management or regional headquarters in India.

V. CRITICAL ANALYSIS AND RECOMMENDATIONS

The POEM test responds to a real limitation of incorporation-only rules: a foreign registration should not necessarily shield a company whose actual strategic management is situated in India. Nevertheless, the test is fact-intensive and may create uncertainty if routine operational decisions are confused with decisions about the company as a whole. A tax authority should distinguish strategic direction from day-to-day execution, and should consider the authority actually exercised rather than merely the title held by an individual.

First, guidance should provide clearer, non-exhaustive examples for remote boards, delegated decision-making, regional headquarters, investment funds and companies with active overseas operations. Second, authorities should use a consistent evidentiary checklist: board papers, contemporaneous minutes, delegation matrices, executive correspondence, approval trails, contracts and records of where major decisions were substantively reached. Documents should be evaluated together; minutes alone should neither establish nor defeat residence.

Third, India should promote timely coordination between tax authorities and treaty partners where dual-residence claims arise. Mutual agreement procedures should be accessible and time-bound where possible, and taxpayers should receive reasoned explanations of the factors that materially influenced a determination. Fourth, compliance expectations should be proportionate to the size and complexity of the entity, without weakening anti-avoidance safeguards. A company that maintains reliable records of real decision-making should be better placed to demonstrate its position.

Finally, courts and administrators should keep three questions separate: the company's legal nationality or incorporation status; its residence under domestic tax legislation; and its entitlement to benefits under a particular treaty. Conflating them risks doctrinal error. A structured, treaty-sensitive approach would preserve the certainty of corporate personality while allowing scrutiny of artificial arrangements.

VI. CONCLUSION

Corporate nationality and corporate residence are related but distinct legal concepts. Incorporation provides a stable basis for identifying a company's legal framework, whereas tax residence may depend on the substance and location of strategic management. Indian law's POEM test, now retained in the Income-tax Act, 2025, seeks to align tax residence with actual decision-making while the judicial decisions discussed above underline the importance of separate corporate personality, statutory interpretation and treaty context. The challenge is not to choose form over substance, or substance over form in every case, but to apply the correct legal test to reliable evidence. Clearer guidance, consistent treaty administration and proportionate compliance can reduce disputes and support both revenue protection and legitimate cross-border investment.

REFERENCES

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[4] Central Board of Direct Taxes, Circular No. 6 of 2017, Guiding Principles for Determination of Place of Effective Management (POEM) of a Company (24 Jan. 2017).
[5] Income-tax Act, 2025, § 6 (effective 1 Apr. 2026).
[6] Union of India v. Azadi Bachao Andolan, (2004) 10 SCC 1.
[7] Vodafone International Holdings B.V. v. Union of India, (2012) 6 SCC 613.