PKF FRANCISCLARK

Chartered accountants & business advisers

Corporate Residence

Determining where a company is tax resident is an important part of establishing how it is taxed, where it is taxed, by whom, and under what treaty it can enjoy benefits such as reduced withholding tax rates. The UK operates two rules to determine where a company is tax resident.

The first rule provides that where a company is incorporated in the UK it is automatically tax resident there.

The second rule is the case law rule and is authoritatively expressed in Lord Loreburn's speech in De Beers Consolidated Mines Ltd v Howe, 5TC213:

'A company resides … where its real business is carried on … and the real business is carried on where the central management and control actually abides'.

The De Beers company was incorporated in South Africa and its main trading operations were there. The controlling board of directors exercised its powers in the UK. The company was held to be resident in the UK.

It is therefore possible for a non UK incorporated company to be resident in the UK if it is managed and controlled from the UK.

Clearly, if a company is incorporated in a foreign country and is managed and controlled from the UK, then there is the possibility that the tax authorities of both countries will lay claim to the taxing rights of the company as the location of residence. On the face of it this results in a dual resident company which is exposed to double taxation.

Networks of double tax treaties have been developed to deal with the possibility of double taxation. In the context of corporate residency most treaties provide a tie breaker – if two countries lay claim to the residency rights, the treaty will provide that the jurisdiction of residency will be the jurisdiction in which the company is 'effectively managed'. Not all treaties include this tie breaker, most notably from a UK perspective the treaties with the US and Holland do not include tie breakers.

There is some debate as to whether 'central management and control' and 'effective management' are the same. Nevertheless, it is certainly the case that both definitions look to the place where the company is managed.

The location of the shareholders is not necessarily relevant but where the directors of the company make their decisions is essential, and consequently the tax residence of the directors is of practical importance. Most tax authorities will be interested to examine where the board meetings are held. These can be both formal board meetings, and also informal board meetings, i.e. those that are unscheduled, but are required in the cut and thrust of commercial activity.

With the ability to communicate instantly in the modern world, with emails, webcams, instant messaging, and other forms of communication, it is harder than ever to determine where business decisions are taken. It also increases the risk that a particular jurisdiction may begin to develop an argument that a foreign company is tax resident there.

On some occasions the authority of the board will be delegated or bypassed, and that may result in HMRC viewing someone other than the director(s) being in control.

We advise a growing number of non-resident companies on how to ensure that they remain non UK resident. We are able to review board minutes and provide further detailed guidance based on case law.

Alternatively, there are occasions when UK tax residence for a foreign company is beneficial, when losses can be group relieved, against other UK group companies for example, and we advise on these cases also.

Contact us

If you would like information or advice on how we can help you, please contact:

John Endacott
Head of International Services
Tax Partner
john.endacott@pkf-francisclark.co.uk
T 01392 667000

For information of users: This material is published for the information of clients. It provides only an overview of the regulations in force at the date of publication, and no action should be taken without consulting the detailed legislation or seeking professional advice. Therefore no responsibility for loss occasioned by any person acting or refraining from action as a result of the material can be accepted by the authors or the firm.

21/1/15_U

PKF Francis Clark has eight offices in the South West: Exeter, New Forest, Plymouth, Poole, Salisbury, Taunton, Torquay and Truro. Please visit www.pkf-francisclark.co.uk for contact details of your nearest office.

PKF Francis Clark is a trading name of Francis Clark LLP. Francis Clark LLP is a limited liability partnership, registered in England and Wales with registered number OC349116. The registered office is Sigma House, Oak View Close, Edginswell Park, Torquay TQ2 7FF where a list of members is available for inspection and at www.pkf-francisclark.co.uk
The term 'Partner' is used to refer to a member of Francis Clark LLP. Registered to carry on audit work in the UK and Ireland, regulated for a range of investment business activities and licensed to carry out reserved legal activity of non-contentious probate in England and Wales by the Institute of Chartered Accountants in England and Wales. Francis Clark LLP is a member firm of the PKF International Limited network of legally independent firms and does not accept responsibility or liability for the actions or inactions on the part of any other individual member firm or firms.