PCG 2018/9 - Central management and control test of residency: identifying where a company's central management and control is located

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In the 2020-21 Budget, the former Government announced technical amendments to clarify the corporate residency test. Legislation to implement this announcement remains unenacted. Announced measures that are not yet law will be subject to consideration by the Government. Taxation Ruling TR 2018/5 *Income tax: central management and control test of residency* and this Guideline provide our existing view on the central management and control test of corporate residency. See Working out your residency for updates regarding our compliance approach and other relevant information.

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Practical Compliance Guideline

Central management and control test of residency: identifying where a company's central management and control is located

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Relying on this Guideline

This Practical Compliance Guideline sets out a practical administration approach to assist taxpayers in complying with relevant tax laws. Provided you follow this Guideline in good faith, the Commissioner will administer the law in accordance with this approach.

Table of Contents **Paragraph**

What this Guideline is about 1
Background 6
Establishing where a company's central management and control is located – relevant evidence 10
Where a company has kept board minutes 11
Where a company has not kept board minutes 14
Identifying high-level decision-making – the relevance of a company's activities 15
Example 1 – large investment business 18
Example 2 – small investment business 21
Example 3 – large trading business 24
Example 4 – special purpose vehicle 26
Is a person merely influential or the real decision-maker? 27
Example 5 – board of directors decides to implement a proposal put forward by its owner 29
Example 6 – is a parent company merely influential or the real decision-maker? 33
Decision-making within a corporate group 39
Example 7 – decision-making by a subsidiary of a corporate group 41
Example 8 – board is required to obtain approval for major items of expenditure or decisions 48

Exercising central management and control vs day-to-day management of a company's operations 50
Example 9 – manager conducting business on company's behalf 51
Example 10 – importance of location of directors' decision making, rather than their residence 55
Example 11 – ForInvest Co 64
Example 12 – SPV Co 68
Decisions made in more than one place 73
Example 13 – decision-making outside the normal course of how central management and control is exercised 81
Example 14 – decision-making equally split between more than one place 87
Example 15 – exercise of central management and control by beneficial owner 94
Transitional compliance approach 102
Ongoing compliance approach for public groups 105
Date of effect 108
Appendix – Risk assessment framework 109
Risk zones 112
Evidencing falling within a risk zone 115
Factors for risk zones 118

What this Guideline is about

1. This Guideline contains practical guidance to assist foreign-incorporated companies and their advisors to apply the principles set out in Taxation Ruling TR 2018/5 *Income tax: central management and control test of residency.* This will help these companies determine whether they are resident under the central management and control test of company residency in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936).

2. This Guideline must be read in conjunction with TR 2018/5, which sets out the Commissioner's views on the meaning of central management and control, and the principles relevant to determining whether a company incorporated outside Australia is a resident under the central management and control test of residency.

3. The examples and guidance contained in this Guideline are general in nature. They cannot, and do not, cover every possible circumstance relevant to determining whether a company is resident, or non-resident, under the central management and control test of company residency.

4. Foreign-incorporated companies who are unsure whether they are resident after having considered TR 2018/5 and this Guideline are encouraged to approach the ATO to discuss their circumstances.

5. This Guideline does not deal with the associated questions of:

- the voting power test of company residency for foreign-incorporated companies[1], or
- when a company carries on business.

5A. This Guideline sets out a transitional and an ongoing compliance approach relevant to some companies.

5B. In addition, it is acknowledged that the residence of a company will often be a 'low-risk' issue for the ATO. This is because, where a company has its operating business wholly offshore but is also a resident of Australia, permanent establishment or branch exemption rules will generally apply in determining the taxation treatment of the profits and losses of the offshore operating business.[1A] This may mean that the company's tax position is similar to what it would be if the company were not resident – for example, where the company is a subsidiary of an Australian company, the resulting taxation position may be sufficiently similar to the position that would arise where the offshore operations formed part of a controlled foreign company (CFC) with attribution under the CFC regime.[1B] Accordingly, it is unlikely the Commissioner would apply resources to review the residence of such companies (other than where there are integrity concerns such as those discussed in paragraph 107A of this Guideline).

5C. For further information regarding the Commissioner's risk assessment framework for the central management and control test of residency for foreign-incorporated companies refer to the Appendix to this Guideline. The purpose of the risk assessment framework is to assist companies with managing their compliance risks for this test of residency. Companies may use the risk assessment framework to understand the likelihood of the ATO applying compliance resources to review their residency.

Background

6. A company is a resident or resident of Australia[2] if:

- it is incorporated in Australia, or
- it is not incorporated in Australia, but it carries on business in Australia and has either its
  - voting power controlled by shareholders who are resident of Australia (the voting power test of residency), or
  - central management and control in Australia (the central management and control test of residency).

[1] The second test of residency for companies not incorporated in Australia in paragraph (b) of the definition of 'resident or resident of Australia' in subsection 6(1) of the ITAA 1936.

[1A] Section 23AH of the ITAA 1936 may apply to a foreign-incorporated company that is a resident of Australia and carries on business in a foreign jurisdiction via a foreign branch. Where the requirements of section 23AH are met, certain income and capital gains of the company are non-assessable non-exempt income.

[1B] In addition to the potential application of section 23AH (see footnote 1A of this Guideline), foreign-incorporated companies that are residents of Australia may treat certain income as non-assessable non-exempt income where Subdivisions 768-A and 768-G of the *Income Tax Assessment Act 1997* (ITAA 1997) apply (regarding distributions received on non-portfolio equity interests held in foreign companies and reductions in capital gains and losses arising from CGT events in relation to certain voting interests in foreign companies). These provisions may result in taxation outcomes similar to those where such companies are treated as non-resident and subject to the CFC rules in Part X of the ITAA 1936. 'Controlled foreign company' is defined in section 340 of the ITAA 1936.

[2] Subsection 6(1) of the ITAA 1936.

7. As noted in paragraph 7 of TR 2018/5, if a company carries on business and has its central management and control in Australia, it will carry on business in Australia within the meaning of the central management and control test of residency. It is not necessary for the substantive trading or investment activities of the business that generate its profits to take place in Australia.[3]

8. The location of a company's central management and control is a question of fact that is determined by reference to:

- where it is controlled and directed as a matter of substance, and
- how its control and direction is exercised over time (see paragraph 79 of this Guideline).

9. Normally, a company's directors exercise its central management and control where they execute their duties and comply with the standards expected of directors under the applicable Australian or foreign company law. This will normally be where its directors make their decisions. Most companies will have little difficulty identifying where it is located and little reason to consider the examples set out in this Guideline. The exceptions to this involve either some lapse in directorial standards or corporate governance, unusual facts such as the director's role being usurped by outsiders, or the company's control and direction being exercised in more than one place.

Establishing where a company's central management and control is located – relevant evidence

10. Board minutes are the starting point for identifying who exercises and where a company's central management and control is exercised. Only when a company has not kept board minutes, it makes high-level decisions outside of board meetings, the board minutes do not disclose where directors are making a company's high-level decision or the board minutes are false (including where they record the rubber stamping of decisions made elsewhere), will it be necessary to look at other evidence of who makes and where they make the company's high-level decisions. This may include documents that identify who has the formal power to make high-level decisions, for example the company's constitution (or other founding documents) or other instruments delegating this power and evidence of the relevant provisions of those documents being followed in practice.

Where a company has kept board minutes

11. If a company has board minutes showing a complete record of where all its high-level decisions were made and who made them, the Commissioner will accept them as prima facie establishing where the company's central management and control was located.

12. A company's board minutes do not need to record board deliberations, why decisions were made, and whether any alternatives were considered or rejected to demonstrate the exercise of central management and control. However, including this material would be valuable evidence that supports matters recorded by the board minutes.

[3] See *Cesena Sulphur Co Ltd v. Nicholson; The Calcutta Jute Mills Company Ltd v. Nicholson* (1876) 1 Ex.D 428 at [446]; *De Beers Consolidated Mines Ltd v. Howe* [1930-1911] 5 TC 198 at [213]; endorsed in *North Australian Pastoral Company Limited v Federal Commissioner of Taxation* [1946] HCA 17*; Bywater Investments Limited v Commissioner of Taxation* [2016] HCA 45 at [45]; *Esquire Nominees Ltd as Trustee of Manolas Trust v Commissioner of Taxation (Cth)* [1973] HCA 67 at [27]; and in *Koitaki Para Rubber Estates Limited v Federal Commissioner of Taxation* [1941] HCA 13; 64 CLR 241 per Rich ACJ at [241]; *Koitaki Para Rubber Estates Limited v Federal Commissioner of Taxation* [1940] HCA 33; 64 CLR 15 per Dixon J at [19–20]; *Union Corporation Limited v. Commissioners of Inland Revenue* (1945-1953) 34 TC 207 at [271].

13. Board minutes that are a true account of where and by whom company decisions are made will generally be treated as conclusive, for practical purposes, of where a company's central management and control is exercised. In the absence of board minutes or where details of board minutes are shown to be false or misleading, the Commissioner will rely on other evidence to make a determination of where central management and control is exercised.

Where a company has not kept board minutes

14. If a company has not kept board minutes recording who made its decisions or where they were made, or not all of the company's high-level decisions are made in board meetings, then other evidence will be considered in determining where central management and control is exercised. This may include papers circulated to board members in advance of meetings, contemporaneous emails and correspondence that show the board's deliberations and the role played by each director in the company's decision-making. The Commissioner will also consider oral evidence and statements by those involved in the company's decisions.

Identifying high-level decision-making – the relevance of a company's activities

15. What constitutes high-level decision-making of a company is a question of fact to be determined in light of the company's overall business activities. It is also necessary to consider whether a particular act is properly characterised as an exercise of central management and control, or an exercise of the day-to-day management of a company's business under the authority and supervision of a higher-level control (see paragraphs 50 to 72 of this Guideline).

16. The more extensive a company's business activities, the more likely it is that high-level decisions that are an exercise of its central management and control will be distinct from day-to-day management decisions about business operations or transactions. This is particularly the case if the decisions in question are made by employees or agents of the company under the supervision of, and under authority granted to them by, the board of directors (whether directly or indirectly) (see paragraphs 50 to 72 of this Guideline).

17. The smaller the scale of the company's business activities, particularly where there is no division between those who make the high-level decisions and those who execute them, the more likely it is that the high-level decisions will overlap with, or be the same as, the company's decisions to undertake a particular business operation or transaction.

Example 1 – large investment business

18. *InvestFund Co carries on a large investment business. It has an extensive portfolio of Australian investments including Australian Securities Exchange shares, bonds, debentures and non-portfolio holdings in private companies. InvestFund Co frequently buys and sells these investments, often making several hundred trades per month.*

19. *InvestFund Co's day-to-day trading decisions on its investments are made by employees located in Sydney and 2 foreign jurisdictions. These employees make trading decisions acting under the authority granted to them by and under the ongoing supervision of the board, in line with the investment policies and strategies set by the board. The investment policies and strategies put in place by the board include a risk framework, and identify the type of investments to be made, the criteria for when they are to be made, and limits on the size of investments that may be made.*

20. *The setting by the board of InvestFund Co's investment policies and strategies are the high-level decisions amounting to an exercise of its central management and control. In contrast, the making of individual trading decisions by the company's employees within these policies and under the authority granted to them by and under the supervision of the board of directors are not (see paragraphs 50 to 72 of this Guideline).*

Example 2 – small investment business

21. *PrivateInvest Co conducts a small passive investment business. At any given time, it holds 2 to 3 investments in listed and unlisted companies. These investments are held for long periods. Each holding represents a significant part of PrivateInvest Co's overall holdings. Capital raisings, takeovers and demergers conducted by these companies, their performance and general market conditions require decisions about whether to hold or sell these investments to be made. Share sales and purchases are otherwise only made once or twice every few years.*

Possibility A – PrivateInvest Co's directors make but do not execute investment decisions

22. *The directors of PrivateInvest Co conduct regular reviews of its investments in light of prevailing conditions and make decisions about selling or otherwise dealing with them. These decisions are the high-level decisions amounting to the exercise of central management and control. PrivateInvest Co has a small number of administrative staff that execute the decisions made by its directors. It has no other staff. The administrative staff executing those decisions are not exercising central management and control.*

Possibility B – PrivateInvest Co's directors make and execute investment decisions

23. *Apart from its directors, PrivateInvest Co has no employees who both make the decisions on which investments are bought and sold, and execute those decisions. The decisions on which investments are bought and sold are PrivateInvest Co's high-level decisions and are an exercise of its central management and control.*

Example 3 – large trading business

24. *Widgets Inc is a manufacturer of Widgets. It sells Widgets directly to consumers and through wholesale distributors in a number of countries around the world. The high-level decisions that amount to an exercise of its central management and control include determining:*

- *Widgets Inc's sales and trading policies, including what markets to sell in, whether to operate physical and online stores and pricing policies, and*
- *whether Widgets Inc outsources production, and policies and decisions on where and how it will operate its own production facilities.*

25. *In contrast, the day-to-day sales and production management decisions made by Widget Inc's employees that follow the high-level trading and production policies are not exercises of its central management and control.*

Example 4 – special purpose vehicle

26. *SPV Co is a special purpose vehicle established to enter into a set of pre-determined transactions before being wound up. These comprise the decision to buy, hold and sell a single investment. SPV Co conducts no other business. After selling the investment, the SPV Co is to be wound up. The decisions to enter into the buy and sell transactions and wind up the company are the key high-level decisions that amount to the exercise of SPV Co's central management and control.*

Is a person merely influential or the real decision-maker?

27. As stated at paragraph 26 of TR 2018/5, a person who is merely influential over a company's directors or other decision-makers with legal authority to control and manage the company does not exercise the company's central management and control, even if they have a strong influence over the directors or other decision-makers.

28. There may be individuals who, while not being directors of a company and lacking any formal power to manage or control it, have an apparent role in making its high-level decisions. Where this is the case, it is necessary to consider who really exercises the company's central management and control. This turns on whether the persons that have an apparent role in making the company's high-level decisions are the real decision-makers, or are merely influential over its directors or other persons who have formal power to manage and control the company.

Example 5 – board of directors decides to implement a proposal put forward by its owner

29. *Company Inc carries on a computing business. Kirk owns 80% of Company Inc. He has had a long and distinguished career in computer engineering and often advises Company Inc's board on global technological trends and advances in this area. He has become increasingly aware of the popularity and potential of a new development in computing called widgets.*

30. *Kirk prepares and provides a lengthy report, business plan and verbal presentation to Company Inc's board on the benefits of investing in the development and sale of widgets. After Kirk's presentation, the board considers Kirk's report and business plan. The directors decide to adopt Kirk's proposed business plan, as they consider the proposed investment to be in Company Inc's best interests. In doing so, they take into account the merits of the proposal, including its impact on Company Inc's financial position, and how it fits within its broader business. Company Inc's board is the real decision-maker.*

31. *Although as an industry technological expert and majority owner of Company Inc, Kirk's advice is given great weight, he was not the actual decision-maker.*

32. *If Kirk was an employee, the outcome would be the same. While he might exercise great influence over the directors, he would merely be influential and not the actual decision-maker.*

Example 6 – is a parent company merely influential or the real decision-maker?

33. *Abroad Co is a privately-held investment company incorporated in Foreignland. Abroad Co's ultimate parent is an Australian company. Abroad Co carries on a small-scale investment business. It makes approximately 2 to 3 large transactions per year, involving the acquisition and disposal of shares which are normally held for long periods. Its directors are provided by a corporate services provider and are resident in Foreignland*.

34. *Abroad Co's directors regularly receive written and oral proposals from its ultimate Australian owner, detailing the transactions that its Australian owner wants Abroad Co to make. The decisions on whether to enter these transactions represent the high-level decisions of Abroad Co's business.*

Possibility A – Abroad Co's directors merely rubberstamp decisions made by its Australian owners

35. *The directors habitually follow directions received from Abroad Co's ultimate Australian owner. On examination, they are shown to have no knowledge of Abroad Co's business, financial position or the implications of the transactions they claim to have made the decision to enter. They are also unable to articulate why these decisions were made. The evidence establishes that they would not have been able to determine whether any of the decisions were illegal or improper, or whether they were in the best interests of the company. The evidence establishes that at all times Abroad Co's directors have:*

(a) *followed all the proposals received without deviation*

(b) *mechanically implemented the proposals without considering the merits of the transactions, and*

(c) *not otherwise made any independent high-level decisions relating to Abroad Co's affairs.*

36. *The directors are merely 'rubberstamping' high-level decisions made by Abroad Co's Australian owner. The Australian owner is the real decision-maker and exercises central management and control in Australia. Abroad Co is therefore a resident of Australia under the central management and control test of residency.*

Possibility B – Abroad Co's directors independently consider directions given to it by its Australian owners

37. *Abroad Co's owner regularly sends proposals regarding investments to its directors. While the directors regularly implement transactions suggested by the owners, the evidence shows that they actively consider them and seek independent advice where necessary prior to doing so. The directors meet in Foreignland, where they decide whether to make the proposed investments. They do so based on information in the proposal and any independent advice they obtain. Where the local advice indicates that a proposal is unlawful or has adverse consequences for the company or owner, the directors do not decide to implement it.*

38. *The Australian owner is merely, albeit strongly, influential. Abroad Co's directors are the real decision-makers and exercise central management and control of Abroad Co in Foreignland. Abroad Co is therefore not a resident of Australia under the central management and control test of company residency.*

Decision-making within a corporate group

39. It may often be in the best interests of a company and its shareholders to further the policies, interests and proposals of the corporate group of which it is a member, and its ultimate parent. The Commissioner accepts that the directors of a subsidiary company do not cease to exercise its central management and control merely because in making decisions they conclude that it is in the best interest of the company to:

- facilitate the plans and policies of its parent
- comply with proper proposals advanced to it by its parent that are also in the interest of the company group, or
- make decisions only after receiving approval from its parent to do so.

40. A foreign-incorporated subsidiary of an Australian-resident company may also have employees of its parent as directors. This is not, of itself, conclusive of where the subsidiary's central management and control is exercised.

Example 7 – decision-making by a subsidiary of a corporate group

41. *Sub Co is a company incorporated in Foreignland and is a wholly-owned subsidiary of Aust Co, an Australian listed company. Aust Co requires Sub Co to comply with its policies where lawful in conducting its business.*

Possibility A – Sub Co's directors make decisions in line with its parent's policies

42. *Sub Co's board meets in Foreignland where it makes all its high-level decisions. The board considers the business activities and financial position of Sub Co in addition to any consequences of the transactions. There is a process of discussion and consultation before any decisions are made.*

43. *The decisions of Sub Co's board comply with Aust Co's policies. However, the Board exercises central management and control, as it makes independent decisions within Aust Co's policy framework only after deciding it is in the best interests of Sub Co to do so. Sub Co is not a resident of Australia under the central management and control test of residency.*

Possibility B – Sub Co's Chief Financial Officer is an employee of its parent

44. *Assume the same facts as Possibility A. However, one of Sub Co's directors is the Chief Financial Officer (CFO) of Aust Co and an Australian resident. The CFO travels to Foreignland to attend board meetings. The board considers the business activities and financial position of Sub Co in addition to any consequences of the transactions. There is a process of discussion and consultation before any decisions are made.*

45. *Aust Co's CFO does not control the decisions of Sub Co or exercise its central management and control independently of the other directors. No instance or pattern of decision-making exists where the CFO exercises central management and control to the exclusion of the other directors. There is no evidence of the parent otherwise usurping the board and exercising central management and control. Sub Co is not a resident of Australia under the central management and control test of residency.*

Possibility C – Sub Co's board merely implements the decisions of its parent, Aust Co

46. *Aust Co's board sets global policies containing highly detailed operational and trading policies that Sub Co's board must follow. These policies cover the entirety of Sub Co's activities. Sub Co must also comply with any directions received from Aust Co's board.*

47. *Sub Co's board holds meetings where it mechanically follows directions from Aust Co's board on what decisions it is to make and policies to adopt. Its directors do so without giving any consideration as to the merits of those directions. It does not make any independent decisions regarding Sub Co's business or affairs. Sub Co's board is merely rubberstamping the decisions made by Aust Co's board. Aust Co's board is the real decision-maker and makes the decisions as to what decisions Sub Co is to make and what policies to adopt in Australia. Aust Co's board therefore exercises central management and control of Sub Co in Australia. Sub Co is therefore a resident of Australia under the central management and control test of company residency.*

Example 8 – board is required to obtain approval for major items of expenditure or decisions

48. *Worldwide Co is incorporated in Foreignland and is a subsidiary of Aust Co which is incorporated in Australia. Worldwide Co holds all of its board meetings in Foreignland, where its directors make all the high-level strategic decisions about its business. Aust Co controls the finance it provides to Worldwide Co, and Worldwide Co must obtain Aust Co's approval for major items of expenditure and financing decisions proposed by the board. Aust Co does not have any other involvement in the high-level decisions regarding the operations of Worldwide Co.*

49. *The ultimate decisions of Worldwide Co's board comply with Aust Co's expenditure approvals and decisions relating to the finance it provides. It does not make decisions contrary to its parent company's wishes, unless to do so would be illegal or improper. However, these decisions are made by the Board only after deciding it is in the best interests of Worldwide Co to make them. Worldwide Co's central management and control is exercised by its board of directors in Foreignland, where Worldwide Co is therefore resident. Worldwide Co is not a resident of Australia under the central management and control test of company residency.*

Exercising central management and control vs day-to-day management of a company's operations

50. As stated at paragraph 12 of TR 2018/5, the day-to-day management of a company's business under the authority and supervision of the board of directors, or other higher-level managers or controllers, is not an exercise of central management and control. The Commissioner accepts the board may grant wide and extensive powers of management to the company's employees, yet still retain and exercise central management and control of the company.

Example 9 – manager conducting business on company's behalf

51. *Multinational Co is incorporated in Ostasia and carries on business solely in Australia. The shareholders and directors of Multinational Co are residents of and live in Ostasia. Its directors hold board meetings and perform their duties as the company's high-level decision-makers in Ostasia.*

52. *Multinational Co's board of directors establish an overarching framework and policies for how its operations are to be run. It also appoints an Australian-based manager to manage its Australian business activities and gives them wide authority to do so under its supervision. This includes the authority to make decisions on major contracts, as well as financing and general trading policies for its Australian business. Despite the wide authority granted to the Australian manager, the board retains the power to override any proposed decisions before they are made. It also retains the power to direct the Australian manager on how they are to conduct the Australian operations.*

53. *During board meetings, the board makes high-level decisions about Multinational Co's Australian business. The board reviews Multinational Co's Australian business and the Australian manager's performance. The board concludes that the business and Australian manager are performing competently and in line with how it wants the business run. The evidence shows that the board has the power to, has historically, and is prepared to intervene if it is not satisfied with the decisions of the Australian manager, or how they are running the business. Where the board deems it necessary, it further directs the Australian manager on how to conduct the business.*

54. *Multinational Co's central management and control is exercised by its board of directors in Ostasia, not the Australian manager. It is therefore not a resident of Australia under the central management and control test of company residency.*

Example 10 – importance of location of directors' decision-making, rather than their residence

55. *ByteT Co is a small company incorporated in Foreignland. Its business is the provision of computer consultancy services. Stuart is its sole shareholder, director and employee. Stuart lives in Foreignland and is also a non-resident for Australian income tax purposes. Stuart performs all the services provided by the company and controls every aspect of ByteT Co's decision-making.*

56. *ByteT Co is offered and, while in Foreignland, Stuart (acting on behalf of the company) decided to accept a contract to provide consultancy services in Australia over a 4-month period.*

Possibility A – Stuart makes day-to-day business decisions while in Australia

57. *While performing the contract in Australia, ByteT Co is offered 2 small consulting contracts to be performed in Australia for its usual services. As sole director and employee of ByteT Co, Stuart accepts these contracts while he is in Australia. After completing the 3 contracts in Australia, Stuart returns to Foreignland where he continues to run ByteT Co's business as before.*

58. *Stuart's decision to accept 2 small contracts in Australia for services that are within the ordinary scope of ByteT Co's existing business are day-to-day management decisions. They are not high-level strategic decisions that amount to an exercise of central management and control in Australia. ByteT Co's central management and control is therefore not located in, and nor is it a resident of, Australia under the central management and control test of company residency.*

Possibility B – Stuart begins to make high-level decisions of ByteT Co solely in Australia

59. *While performing the contract in Australia, ByteT Co is offered a major ongoing contract in Australia that would greatly increase the size of its business. The contract is for services that ByteT Co has never previously offered and would require it to establish a*

substantial Australian operation, including hiring staff and leasing premises. Due to the significant change in focus for the business, in accepting the contract ByteT Co considers it would be unable to continue actively running the business in Foreignland for the period of the contract.

60. *While still in Australia, and after consulting with his professional advisors and banks, Stuart decides to accept the contract and change ByteT Co's business while he is in Australia. He signs the contract and makes arrangements to set up the Australian operation. This includes appointing a local manager to run it under his supervision. From this time, Stuart ceases making any high-level decisions about ByteT Co's business in Foreignland.*

61. *Stuart's decisions to accept the contract and change ByteT Co's business by setting up a new Australian operation, and halt its Foreignland business operation, are an exercise of its central management and control.*

62. *ByteT Co will be a resident of Australia under the central management and control test of company residency from the time Stuart makes the decision to change ByteT Co's business and starts making all its high-level decisions while he is in Australia.*

Possibility C – Stuart continues to make high-level decisions of ByteT Co in Foreignland

63. *Assume the same facts as possibility B, however ByteT Co considers that it can continue its Foreignland business. Prior to making the decision to expand ByteT Co's business to Australia, Stuart returns to Foreignland. While in Foreignland, he consults with his professional advisers and banks, and makes the decision to accept the contract and commence carrying on business in Australia. Once the Australian operations are set up, Stuart does not visit Australia, and makes all the high-level decisions relating to ByteT Co's Australian and Foreignland business in Foreignland. Stuart exercises ByteT Co's central management and control in Foreignland. ByteT Co is not a resident of Australia under the central management and control test of company residency.*

Example 11 – ForInvest Co

64. *ForInvest Co is an investment company incorporated in Foreignland which carries on business running an investment fund. Its directors are based in Foreignland.*

65. *ForInvest Co engages another entity, AusManager Co, to manage its investment fund. AusManager Co's authority to make decisions, negotiate and conclude contracts is limited by the authority granted to it by ForInvest Co's board of directors, including the investment framework they set. It manages the investment fund under that authority and the ongoing supervision of ForInvest Co's board of directors. The decisions it makes are the conduct of ForInvest Co's day-to-day business under the authority and supervision of ForInvest Co's board of directors. They do not constitute the exercise of ForInvest Co's central management and control.*

66. *The minutes of ForInvest Co's board meetings record that the board of directors meet in Foreignland where they:*

(a) *determine*

- *the operational policy and investment strategies of ForInvest Co*
- *the overarching policy for how the assets of each of the company's funds are to be invested, and*
- *whether to establish other investment funds*

(b) *decide to appoint AusManager Co to manage its investment fund, and*

(c) *review and exercise oversight of the performance of the investment fund and AusManager Co.*

67. *There is no evidence that the board minutes are false or misleading in any respect. The Commissioner accepts that ForInvest Co's high-level decisions are made by its directors in Foreignland, that its central management and control is located in Foreignland and that ForInvest Co is not an Australian resident under the central management and control test of company residency.*

Example 12 – SPV Co

68. *SPV Co is a special purpose vehicle incorporated in Foreignland to acquire a single asset. The board of SPV Co makes the decision at a meeting in Foreignland in its first year to buy and hold the asset. It also resolves that no distributions will be made during the holding period of the investment, which is anticipated to be 3 years.*

69. *The decision to buy the asset and the distribution decision are an exercise of central management and control. SPV Co's central management and control is located in Foreignland and it is not an Australian resident under the central management and control test of residency.*

70. *During the 3 years where SPV Co holds the investment, the directors do not meet and no strategic decisions are made.*

71. *SPV Co continues to be a non-resident of Australia in these years as nothing has occurred to cause the central management and control of SPV Co to be exercised somewhere other than Foreignland.*

72. *After holding the asset for 3 years, the board of SPV Co meets in Foreignland and decides to sell the investment and that the SPV Co is to be wound up. The decisions to sell the investment and to wind up the company are the key high-level decisions that amount to the exercise of SPV Co's central management and control. SPV Co's central management and control is located in Foreignland and it is not an Australian resident under the central management and control test of residency.*

Decisions made in more than one place

73. In circumstances where a company's high-level decisions are made in more than one place, special care must be taken to identify where its central management and control is located. In these situations, it may be that the central management and control of the company is divided and located in multiple places.

74. The underlying considerations are:

(a) in which place, or places, were high-level decisions of the company made as a matter of substance and fact, and

(b) whether central management and control is exercised in that place to a substantial degree, sufficient to conclude the company is really carrying on business there.

75. Both are questions of fact to be determined by reference to the circumstances of each case. The central management and control test of residency is focused on identifying where a company's control and direction is exercised in substance. This is regardless of

whether decisions are made in traditional face-to-face meetings or with the aid of modern communications technology.

76. A company's decisions may be made in more than one place in 2 basic situations. The directors may:

(a) physically meet in multiple different locations where they exercise central management control of the company – for example, they regularly hold board meetings in more than one country, or

(b) not physically meet in person to make decisions – for example, decisions are made by the directors by phone or video conference, written circular resolution or by email while they are in different physical locations.

77. Where decision-makers are in multiple places, the Commissioner does not accept that a decision is necessarily made in the place it is formalised, or where the last signature is placed on a resolution or vote on it is cast. For the purpose of determining the location of the central management and control of the company, the key question is where the decisions are being made as a matter of substance.

78. Where board meetings are conducted via electronic facilities (rather than physical attendance) the focus is on where the participants contributing to the high-level decisions are located rather than where the electronic facilities are based.

79. The question of where central management and control is located is determined by reference to how it is exercised over time. An occasional or one-off exercise of high-level decision-making in a particular place outside the normal course of how a company's central management and control is exercised, does not cause it to be in that place for the purpose of the central management and control test, unless:

(a) it is, by itself, substantial in the context of the company, or

(b) it forms part of a regular pattern of central management and control being exercised in that place that is substantial in the context of the company.

80. If there is any doubt about whether a company's central management and control is exercised in Australia because there are instances of it being exercised in Australia, careful consideration must be given to the company's overall pattern of decision-making including:

(a) instances of decision-making amounting to an exercise of central management and control at board meetings, and where those meetings are held

(b) any instances where decision-making amounting to central management and control is done outside board meetings and where this occurs

(c) the nature of the decisions made and control being exercised in each place and their significance to the company's business, and

(d) whether one or more of the directors, or another person, is really making the decisions to the exclusion of the other directors (relevant to this is whether certain directors have special powers).

Example 13 – decision-making outside the normal course of how central management and control is exercised

81. *SR Co is a company incorporated in Ostasia. It carries on its substantive trading business in Ostasia. It has 3 directors – 2 are resident in Ostasia and one in Australia. In exercising their duties, the directors of SR Co meet face-to-face with the Australian*

director, Chris, in Ostasia. Chris travels to Ostasia to make the high-level strategic decisions of the company during regular board meetings. The central management and control of SR Co is ordinarily exercised in Ostasia.

Possibility A – one-off meeting of SR Co due to special circumstances

82. *Shortly before one of these regular board meetings, Chris injures his ankle in a skiing accident and is unable to fly to Ostasia for the board meeting. A one-off video conference is organised so that Chris can attend the board meeting from his home in Sydney. The board collectively makes decisions which amount to an exercise of central management and control.*

83. *Chris' participation in the board meeting from Sydney is a one-off and is inconsistent with the normal manner in which SR Co's central management and control is typically exercised at the face-to-face board meetings held in Ostasia. Central management and control of the company is not exercised to a substantial degree in Australia. Therefore, SR Co is not a resident of Australia under the central management and control test of company residency.*

Possibility B – Bob makes a one-off decision due to special circumstances

84. *Bob, SR Co's managing director, is in Australia attending a conference. While he is here, a major investment opportunity arises for SR Co, which requires an urgent decision to be made before he returns to Ostasia. The decision whether to make the investment is, in the context of SR Co's business, a strategic one and not a day-to-day operational decision. It is therefore a high-level decision of the company. The decision is referred to Bob as managing director and he makes the decision while he is in Australia without the involvement of the other directors.*

85. *The relevant high-level decision is made in Australia. However, this is a one-off, and inconsistent with the regular pattern of how SR Co's central management and control is ordinarily exercised.*

86. *The Commissioner accepts that SR Co's central management and control is not exercised to a substantial degree in Australia and that SR Co is therefore not a resident of Australia under the central management and control test of residency.*

Example 14 – decision-making equally split between more than one place

87. *OS Package Co, a company incorporated in Ostasia carrying on a delivery business, has a board of 4 directors. Two of the 4 directors are located in Ostasia and 2 are located in Australia.*

Possibility A – OS Package Co's directors participate equally in decision-making

88. *Board meetings are always conducted by video conference with directors participating equally from where they are based. No single director controls the decision-making to the exclusion of the others.*

89. *High-level decisions are also made outside board meetings by resolution, which are passed via email circulars with all 4 directors participating equally in the company's high-level decision-making from their respective locations.*

90. *The central management and control of OS Package Co is exercised to a substantial degree in Australia. It is therefore a resident of Australia under the central management and control test of residency (even if also a resident in Ostasia) because:*

(a) *all 4 directors participate equally in making all OS Package Co's high-level decisions, and*

(b) *2 of the directors are located in Australia when they do so.*

Possibility B – Sadie makes high-level decisions alone

91. *Sadie is the managing director of OS Package Co and makes the high-level strategic decisions of the company alone. The remaining 3 directors simply assent to her decisions and have no input in the decision-making.*

92. *Key strategic decisions are not made during board meetings of the company. Email correspondence shows that Sadie makes these decisions from her home in Ostasia. Sadie is therefore exercising OS Package Co's central management and control there. OS Package Co's central management is not being exercised to any degree in Australia as its remaining directors, including the 2 Australian directors, do not play any substantive role in its decision-making.*

93. *OS Package Co is not an Australian resident under the central management and control test of company residency.*

Example 15 – exercise of central management and control by beneficial owner

94. *Boom Co is an investment company incorporated in Foreignland. Ben, who lives in and is a resident of Australia, is Boom Co's ultimate beneficial owner. Boom Co has 2 directors who are resident in Foreignland.*

95. *Boom Co conducts a real property investment business outside Australia, holding property for the purpose of deriving rent. The constitution of Boom Co provides that the decisions of the directors are only effective if Ben agrees with them.*

96. *The directors undertake the company's day-to-day operational matters such as collecting rent, paying commission, finding tenants and entering leases, and maintaining the buildings it leases.*

Possibility A – Ben does not exercise the power given to him by the constitution

97. *The directors hold Boom Co's board meetings in Foreignland, at which they make all the high-level strategic decisions about the company's business, including finance, the acquisition and disposal of investment properties, and leasing policies.*

98. *Despite the constitution requiring Ben to agree with the decisions of the board for them to be effective, Ben never does this. He leaves the directors to make whatever decisions they see fit. Ben's involvement in Boom Co is limited to irregularly contacting the directors for updates on the business and receiving regular management reports.*

99. *Boom Co's directors make its high-level strategic decisions without reference to Ben, and therefore exercise its central management and control. The mere fact that Ben has a power under Boom Co's constitution to have the final say on its high-level strategic decisions does not, of itself, mean Ben exercises central management and control. As the central management and control of Boom Co is not actually exercised by Ben in Australia, Boom Co is not a resident of Australia under the central management and control test of company residency.*

Possibility B – Ben makes all final high-level strategic decisions

100. *The directors meet in Foreignland, and make tentative decisions about the company's business, including finance, the acquisition and disposal of investment properties, and leasing policies.*

101. *Ben exercises the power given to him under the constitution and has the final say on all the tentative decisions made by the directors. This includes all Boom Co's high-level decisions, covering leasing policies, funding and general corporate strategies, and Ben does so solely from Australia. Ben does not always accept the views of the directors, and occasionally makes decisions different to the tentative decisions proposed by Boom Co's board. Ben exercises the central management and control of Boom Co. Therefore, Boom Co is a resident of Australia under the central management and control test of company residency.*

Transitional compliance approach

102. This administrative arrangement applied for the transitional period of a foreign-incorporated company that, immediately prior to the withdrawal of Taxation Ruling TR 2004/15 *Income tax: residence of companies not incorporated in Australia – carrying on business in Australia and central management and control*:

- had relied on TR 2004/15 and on that basis was not a resident of Australia
- had not undertaken or entered
  - any artificial or contrived arrangements that affected the location of its central management and control, or
  - any tax avoidance scheme whose outcome depends, in whole or part, on it being a non-resident.
- was an ordinary company incorporated under a foreign equivalent to the *Corporations Act 2001* and was not a foreign hybrid within the meaning of section 830-5 of the *Income Tax Assessment Act 1997* (ITAA 1997) during the transitional period (see paragraph 104 of this Guideline), and
- would have become a resident under the central management and control test of residency under the Commissioner's revised view in TR 2018/5, solely because its central management and control was located in Australia.

103. The Commissioner will not apply resources to review or seek to disturb a foreign-incorporated company's status as a non-resident for the transitional period (see paragraph 104 of this Guideline) where the criteria in paragraph 102 of this Guideline were met, and during this period it:

- changed its governance arrangements, so that its central management and control was exercised outside Australia by the end of the transitional period
- did not commence carrying on business in Australia (other than because its central management and control was exercised in Australia), and
- did not undertake or enter
  - any artificial or contrived arrangements that affect the location of its central management and control; for these purposes, if board meetings are undertaken in another country where that company has a substantive commercial presence, the mere fact that a company may fly Australian directors overseas to attend those board meetings would not by itself be regarded as artificial or contrived, or

- any tax avoidance scheme whose outcome depends, in whole or part, on whether it is a resident or non-resident.

104. The transitional period is the period between and including:

- 15 March 2017, and
- 30 June 2023.

104A. The transitional period ended on 30 June 2023.

104B. The transitional arrangement at paragraph 103 of this Guideline extends to the Commissioner not applying resources to pursue penalties for failing to lodge taxation documents in the approved form, in respect of the income years within the transitional period, as a result of residency status where a company satisfied the criteria in paragraph 102 of this Guideline.

Ongoing compliance approach for public groups

105. As referred to in paragraph 5B of this Guideline, the Commissioner acknowledges that for some foreign-incorporated companies there may not be much difference in Australian taxation outcomes whether the company is treated as a resident of Australia under the central management and control test of residency or not. This can be the case for public groups[4] with strong established governance practices and internal tax processes.

105A. It is recognised that commercial practicalities may result in unintended or unplanned circumstances arising from time to time. Such circumstances may cause the location of central management and control to be subject to question and result in some concern that the Commissioner may seek to dispute a company's residency position. This ongoing compliance approach sets out circumstances where there is a very low risk that the Commissioner would seek to treat a foreign-incorporated company as a resident under the central management and control test of residency to provide ongoing certainty for public groups.[4A]

106. This ongoing compliance approach for public groups sets out a series of conditions in paragraph 107 which, if met by a foreign-incorporated company, means the Commissioner will not allocate resources to review the company's residency position under the central management and control test of residency. Additionally, the Commissioner will not apply resources to review the residency position of these companies as a result of one-off or temporary changes to their established governance practices that result in either board meetings being held in Australia or directors attending meetings from Australia via modern communications technology. Simply because a company does not meet these criteria does not automatically mean that the Commissioner considers it will be a resident of Australia.

[4] A public group for the purposes of this ongoing compliance approach is a group whose head entity or ultimate parent is listed on an approved stock exchange set out in Schedule 3 to the *Income Tax Assessment (1997 Act) Regulations 2021* including a listed holding company of a foreign public group or a wholly-owned subsidiary of a foreign public group where the requirements of the approach are met.

[4A] The provision of compliance guidance is consistent with the duty of good management stemming from the Commissioner's general powers of administration of the taxation laws. As part of the duty of good management, the Commissioner is authorised to make decisions as to the allocation of compliance resources in order to promote the efficient, effective, economical and ethical use of those resources, see Law Administration Practice Statement PS LA 2009/4 *Escalating a proposal requiring the exercise of the Commissioner's powers of general administration* and Practical Compliance Guideline PCG 2016/1 *Practical Compliance Guidelines: purpose, nature and role in ATO's public advice and guidance*.

107. The Commissioner will not apply resources to review or seek to treat a foreign-incorporated company as a resident applying the central management and control test of residency for Australian tax purposes merely because part of the company's central management and control is exercised in Australia, where all the circumstances described in either subparagraph (a) or (b) apply on an ongoing basis:

(a) *Substantial majority of central management and control outside of Australia*

i. the company is

- a subsidiary of an Australian public group, that is an ordinary company incorporated under a foreign equivalent to the *Corporations Act 2001* and is not a foreign hybrid within the meaning of section 830-5 of the ITAA 1997, and treated in the group's Australian income tax returns and financial statements as non-resident for Australian taxation purposes and is disclosed as a CFC, or
- a listed holding company of a foreign public group, or
- a wholly-owned subsidiary of a foreign public group that is an ordinary company incorporated under a foreign equivalent to the *Corporations Act 2001* and is not a foreign hybrid within the meaning of section 830-5 of the ITAA 1997, and is treated in the group's income tax returns and financial statements as a resident of a listed country, and

ii. a substantial majority of the company's central management and control is exercised in a foreign jurisdiction (that is not a tax haven[5]) where it is treated as a resident for tax purposes under that jurisdiction's law[6] through

- board meetings that are held outside Australia, or
- board meetings (including meetings via the use of modern communications technologies including teleconferencing) where the majority of directors are not present in Australia when such meetings take place, or
- decisions by the board undertaken by circular resolution where the majority of directors are not present in Australia when such decisions are made.

(b) *Wholly offshore operating subsidiary company*

i. the company is a subsidiary of a public group, that is an ordinary company incorporated under a foreign equivalent to the *Corporations Act 2001* and is not a foreign hybrid within the meaning of section 830-5 of the ITAA 1997, and is treated as a non-resident and

[5] The term 'tax haven' for the purposes of this Guideline is used pursuant to the Organisation for Economic Co-operation and Development (OECD) definition in OECD 1998, *Harmful Tax Competition: An Emerging Global Issue,* OECD Publishing, Paris.

[6] A company is a 'resident of a foreign jurisdiction' for the purposes of this Guideline if it is a resident (or equivalent) under that jurisdiction's law such that it is subject to comprehensive liability to tax in the jurisdiction and not subject only to taxation limited to income from sources in that jurisdiction. For avoidance of doubt, a company is not excluded from this definition where it is a resident (or equivalent) under a foreign jurisdiction's law and subject to comprehensive liability to tax in that jurisdiction, and that jurisdiction has a territorial tax system.

a CFC[7] for Australian taxation purposes in the group's Australian income tax returns and financial statements, and

ii. the company:

- has a wholly offshore operating business[8] in one (or more) foreign jurisdiction(s) not being a tax haven(s) that would constitute an outbound branch or permanent establishment in each jurisdiction if the company was an Australian resident, and
- is incorporated in, and treated as a resident of, the same foreign jurisdiction being that (or one of those) jurisdiction(s), and
- has established governance practices such that part of its central management and control is exercised in the foreign jurisdiction in which it is incorporated and resident, and
- has a taxation position in Australia that is sufficiently similar to what it would be if the company was an Australian resident.[9]

107A. However, a public group cannot rely on the ongoing compliance approach where a company has undertaken or entered into:

- any artificial or contrived arrangement affecting the location of its central management and control, including previous or subsequent 'migration' of residency; for these purposes, if board meetings are undertaken in another country where that company has a substantive commercial presence, the mere fact that a company may fly Australian directors overseas to attend those board meetings would not by itself be regarded as artificial or contrived
- a tax avoidance scheme whose outcome depends, in whole or part, on the location of its residence, including any arrangement identified in a Taxpayer Alert (or similar public advice)
- arrangements to conceal ultimate beneficial or economic ownership, or
- arrangements involving abuse of governance processes including backdating of documents or the board not truly executing its functions or duties.

107B. Nothing in paragraphs 106 and 107 of this Guideline prevents the Commissioner from applying resources to review a company's residency position when the Commissioner considers there is a risk that any arrangements or schemes mentioned in paragraph 107A have been undertaken or entered into.

[7] In accordance with Part X of the ITAA 1936.

[8] The term 'operating business' is used in contradistinction to passive business. A company has a passive business if its activities are relatively limited and consist of passively receiving income and making payments or distributions to its shareholders, including a business that only involves holding shares or other passive investments, for example, an interest in a financial instrument.

[9] See paragraph 5B of this Guideline and footnotes 1A and 1B above regarding taxation outcomes that may arise due to the operation of sections 23AH and Part X of the ITAA 1936. As a result of these provisions, a company's Australian taxation position may be sufficiently similar whether it is or is not treated as a resident under the central management and control test of residency. Appropriate compliance with the CFC rules in Part X of the ITAA 1936 would be indicative of a sufficiently similar tax position where the other requirements of subparagraph 107(b) are met.

107C. Additionally, where a company that satisfies the criteria in paragraph 107 of this Guideline fails to lodge a return as a result of an honest but mistaken belief that the company was a non-resident, the Commissioner will not apply resources to pursue penalties for failing to lodge taxation documents in the approved form.[10]

Evidencing falling within the ongoing compliance approach

107D. The Commissioner acknowledges that for many public groups there are corporate governance controls and processes that occur outside of local board processes for a foreign-incorporated subsidiary and inform local directors' deliberations and decision-making in the relevant foreign jurisdiction. For example, a regional investment committee approval process or a project steering committee process.

107E. The Commissioner accepts that public groups that maintain effective corporate governance with established controls and practices in relation to their foreign-incorporated subsidiaries, should be able rely on these processes to demonstrate that local directors exercise independent consideration and judgment for the purposes of this ongoing compliance approach. This includes circumstances where some Australian staff are involved in group and regional review and steering processes alongside local directors. This also includes circumstances in which local director approvals occur in the relevant foreign jurisdiction via circular resolution based on deliberations, processes and approvals completed outside of board meetings under the group's corporate governance controls.

107F. The Commissioner may make enquiries in the course of ordinary engagement and assurance activities to confirm that the criteria in subparagraphs 107(a) or (b) is met and no circumstances in paragraph 107A exist. Such enquiries will typically commence with regard to existing information available to the Commissioner obtained through routine lodgment obligations and existing engagement and assurance activities. Where circumstances in paragraph 107A exist, a public group cannot rely on established governance controls and processes to demonstrate that local directors exercise independent consideration and judgment.

107G. Foreign-incorporated companies that do not meet the conditions in paragraph 107 may refer to the Appendix to this Guideline for further information regarding the Commissioner's risk assessment framework for the central management and control test of residency. Foreign-incorporated companies that meet the conditions in paragraph 107 do not need to further consider the Appendix to this Guideline. For avoidance of doubt, foreign-incorporated subsidiaries of public groups that have undertaken or entered into arrangements or schemes listed in paragraph 107A fall within the high-risk zone of the risk assessment framework.

Date of effect

108. This Guideline applies from 21 June 2018.

Commissioner of Taxation
20 December 2018

[10] In respect of the failure to lodge penalty, refer to Law Administration Practice Statement PS LA 2011/19 *Administration of the penalty for failure to lodge on time*.

Appendix – Risk assessment framework

109. This Appendix sets out the Commissioner's risk assessment framework for the central management and control test of residency for foreign-incorporated companies. Companies may use this framework to understand the likelihood of the ATO applying compliance resources to review their residency status. Where a company has self-assessed as being a resident or a non-resident consistent with the view in TR 2018/5 and this Guideline, particularly where its central management and control is ordinarily only exercised in one jurisdiction, or the requirements of the ongoing compliance approach for public groups are met[11], the company may choose not to consider this framework.

110. As outlined in this Guideline, it is acknowledged that the residency of a foreign-incorporated company will often be a 'low-risk' issue for the ATO. ATO engagement relating to this issue will continue to form part of ordinary engagement and assurance activities.

111. The risk assessment framework must be read together with TR 2018/5, which outlines the Commissioner's interpretation of the relevant law. Foreign-incorporated companies will also need to consider the application of the voting power test of company residency.[12]

Risk zones

112. The following tables outline the Commissioner's compliance approach for the central management and control test of residency. Where a company has relied on this framework for an income year, the Commissioner may, in the course of ordinary engagement and assurance activities, seek to verify the risk zone that a company has determined it falls within. This framework applies both before and after its date of issue.

113. Where a company's circumstances are not within this framework, this does not mean there is a high risk of the company being a resident of Australia under the central management and control test; however, the Commissioner may engage with the company to understand its circumstances.

114. This risk assessment framework is made up of 3 risk zones. A company can expect the following treatment depending on its risk zone.

Table 1: ATO treatment for foreign-incorporated companies within risk zones

Risk zone	ATO treatment
Low	The Commissioner will not normally allocate resources to review a company's position on the central management and control test of residency in the low-risk zone.
Moderate	A company that falls within the moderate-risk zone is more likely to be subject to compliance activity. The Commissioner may conduct further analysis to understand the company's residency position and taxation outcomes through ordinary engagement and assurance activities. Where

[11] The ongoing compliance approach for public groups is outlined at paragraphs 105 to 107G of this Guideline.
[12] The second test of residency for companies not incorporated in Australia in paragraph (b) of the definition of 'resident or resident of Australia' in subsection 6(1) of the ITAA 1936.

	multiple moderate-risk factors identified in Table 2 apply to a company, it is more likely that compliance activity will be considered. Where a company meets one of the moderate-risk zone factors, this does not necessarily indicate the Commissioner has concerns with the residency position that has been self-assessed, rather there may be potential for residency risks to arise (particularly where additional factors in this zone are present). Companies in this risk zone may wish to monitor and address applicable factors, and improve their reporting and governance practices and documentation, so that they can move within the lower-risk zone.
High	A company that falls within the high-risk zone will likely be subject to compliance activity and need to provide analysis for the Commissioner to understand the relevant facts and circumstances. If further review confirms the company's residency position remains high risk, the Commissioner may proceed to audit where appropriate.

Evidencing falling within a risk zone

115. Companies need to have kept contemporaneous board minutes and governance documents that accurately reflect high-level decision-making and support the company's consideration that it falls within the low-risk zone of this risk assessment framework. This could include contemporaneous records documenting high-level decisions, who made those decisions, and the location where such decisions were made, including any decisions taken outside of ordinary board processes.

116. The guidance provided in paragraphs 107D to 107F of this Guideline also applies for public groups[13] seeking to evidence falling within a risk zone.

117. For companies that do not meet the governance standards in paragraphs 107D to 107E of this Guideline, where evidence of high-level decision-making is not available, inconclusive, or incomplete, a company's residency position is likely to be considered moderate or high risk, subject to the particular facts and circumstances of the company, and consideration of the risk factors outlined in this Guideline. For example, where a closely-held private company's board minutes do not provide complete, contemporaneous or sufficient evidence of where high-level decision-making occurred as a matter of fact and substance, the Commissioner would not accept board minutes as prima facie establishing where the company's central management and control was located. Other supporting documentation to demonstrate high-level decision-making and governance controls and processes would be sought to understand the company's residency position.

[13] The term 'public group' is used consistent with footnote 4 of this Guideline.

Factors for risk zones

118. The factors for determining whether companies fall within each zone are set out in the following table:

Table 2: Risk zone factors

Risk zone	Companies that fall within this zone
Low	*To fall within this low-risk zone, companies must meet one or more of the below-mentioned factors, and not have moderate or high-risk factors (as identified in this Table).* This zone includes a company that self-assesses as non-resident (and has supporting evidence as outlined in paragraphs 115 and 116 of this Guideline) and is a resident of a foreign jurisdiction (that is not a tax haven), where one or more of the following apply: i. The company ordinarily has their central management and control in that foreign jurisdiction, but has one-off or temporary changes to their established governance practices that result in either meetings being held in Australia or directors attending meetings from Australia via modern communications technology. ii. The company is a subsidiary incorporated in that foreign jurisdiction and is subject to an Australian parent company's policies, proposals or approval processes and there is evidence demonstrating independent consideration and judgment by directors in making high-level decisions in that foreign jurisdiction.[14] iii. The company has a wholly offshore operating business in that foreign jurisdiction, the company's tax position in Australia is sufficiently similar to what it would be if the company was an Australian resident[15], and a substantial majority of the company's central management and control is exercised in that jurisdiction through – board meetings that are held outside Australia, or – board meetings (including meetings via the use of modern communications technologies including teleconferencing) where the majority of directors are not present in Australia when such meetings take place, or – decisions by the board undertaken by circular resolution where the majority of directors are not present in Australia when such decisions are made. iv. The company intended to change its governance arrangements so that central management and control was exercised outside Australia under the transitional compliance approach; however, did not meet all the criteria in paragraphs 102 to 104B of this Guideline, solely because it was unable to change its governance arrangements by the

[14] See paragraphs 115 to 117 of this Guideline for assistance in understanding evidence required to meet this factor.

[15] See paragraph 5B of this Guideline and footnotes 1A and 1B of this Guideline regarding taxation outcomes that may arise due to the operation of section 23AH and Part X of the ITAA 1936, and Subdivisions 768-A and 768-G of the ITAA 1997. As a result of these provisions, a company's Australian taxation position may be sufficiently similar whether it is or is not treated as a resident under the central management and control test of residency.

	end of the transitional period (30 June 2023). This factor only applies for the transitional period. From 1 July 2023, these companies should reconsider their governance arrangements in line with TR 2018/5 and this Guideline.
Moderate	*To fall within this moderate-risk zone, companies must not have any high-risk factors, as identified in this Table.* This zone includes a company that self-assesses as non-resident, is a resident of a foreign jurisdiction, in particular a resident of a specified country[16] and one or more of the following apply: i. The company has a repeated or sustained lapse in directorial standards or corporate governance, including in circumstances where there are only one or few people who make decisions in a closely-held private group, and it is difficult to ascertain in what capacity a person is making decisions in Australia (creating uncertainty regarding where central management and control is exercised). This also includes circumstances where a company does not always keep contemporaneous board minutes and records that accurately reflect the company's high-level decision-making.[17] ii. The majority of directors of the company spend most of their time in Australia but are stated to make all high-level decisions in a foreign jurisdiction. However, the company's business or directors' circumstances and roles indicate that high-level decisions appear to be made more regularly or outside of board meetings in Australia. iii. There are circumstances relating to the exercise of central management and control of the company that appear to lack a clear commercial basis. For example, the foreign jurisdiction where high-level decisions are ordinarily made do not appear to be compatible with the company's economic presence and operations and there may not be obvious commercial or other non-taxation reasons or connections to the jurisdiction. Alternatively, the directors do not appear to ordinarily make high-level decisions in the jurisdiction in which the company is incorporated or there appears to be no clear commercial rationale for incorporation in the relevant foreign jurisdiction, such as where no or minimal staff are employed in the foreign jurisdiction and the company is highly reliant on its Australian parent or associates to enable its operations. iv. There are unusual circumstances such as the director's role or roles appearing to be undertaken by outsiders (such as ultimate shareholders or beneficial owners in closely-held private groups) in Australia who appear to make high-level decisions, or where one or more of the company's directors are employed by its Australian parent and it is unclear to what extent the company's high-level decision-making is being dictated by the Australian parent. There may be a

[16] The term 'specified country' for the purposes of this risk assessment framework is used consistent with the International dealings schedule instructions 2023. See Appendix 1 to the International dealings schedule instructions for a list of specified countries.
[17] See paragraphs 115 to 117 of this Guideline for assistance in understanding evidence required under this risk assessment framework.

	question of whether a person is merely influential or the real decision-maker. v. There appears to be some mismatch between legal form arrangements relating to residency outcomes and high-level decision-making in substance, including some mismatch between where central management and control is exercised as documented in available records and the substance of high-level decision-making. vi. The company's residency position relates to a broader set of taxation issues being reviewed by the Commissioner. vii. The company purports to have satisfied the criteria of the transitional compliance approach within the transitional period up until 30 June 2023, however, is unable to adequately demonstrate satisfaction of all the requisite criteria.
High	This zone includes a company that self-assesses as non-resident, in particular a resident of a specified country, and one or more of the following apply: i. The company does not appear to be a tax resident of any foreign jurisdiction. ii. The company does not appear to be subject to the taxation laws of, or source taxation in, any foreign jurisdiction. iii. There are facts, or an absence of facts, suggesting that central management and control is not being exercised in any foreign jurisdiction. iv. Tax and profit outcomes in Australia do not appear to be commensurate with Australian operations – for example, where significant functions, assets and risks relating to the company's operations appear to be located in Australia including some high-level decision-making, and minimal or no staff are employed in the relevant foreign jurisdiction; however, the company does not have an Australian permanent establishment or branch with attributable profits or income in relevant years. v. There is an artificial or contrived arrangement affecting the location of central management and control, including previous or subsequent 'migration' of residency. This does not include where there are genuine, commercial purposes for the migration. For these purposes, if board meetings are undertaken in a country where a company has a substantive commercial presence, the mere fact that a company may fly Australian directors overseas to attend those board meetings would not by itself be regarded as artificial or contrived. vi. A tax avoidance scheme exists whose outcome depends, in whole or part, on the location of a company's residence, including any arrangement identified in a Taxpayer Alert (or similar public advice). vii. There are arrangements to conceal ultimate beneficial or economic ownership. viii. There are arrangements involving abuse of governance processes, such as backdating of documents, or the board not truly executing its functions or duties. This also includes where the details of board minutes are shown to be false or misleading.

	ix.	Evidence indicates that there is no substantive high-level decision-making in the jurisdiction in which the company is incorporated or a resident (or in the foreign jurisdiction where it is asserted that central management and control is exercised), including evidence of mere implementation, or rubberstamping, of decisions made by others or by directors without the exercise of independent consideration or judgment. Public groups that maintain effective corporate governance consistent with paragraphs 107D and 107E of this Guideline would not fall within this factor.

Amendment history

1 November 2023

Part	Comment
Paragraph 5B	Footnotes added providing relevant legislative references and explanations. Minor wording changes for consistency and readability.
Paragraph 5C	Paragraph inserted providing a reference to the Commissioner's risk assessment framework for the central management and control test of residency and outlining the purpose of the framework.
Paragraph 8	Minor grammatical update.
Paragraphs 22 and 23	Headings amended to add scenario descriptors for consistency.
Paragraph 82	Heading amended to add scenario descriptor for consistency.
Paragraph 83	Minor grammatical update.
Paragraphs 84, 88 and 91	Headings amended to add scenario descriptors for consistency.
Paragraphs 102 to 104B	Minor wording changes to reflect that the transitional compliance approach transitional period has ended.
Paragraphs 104A and 104AA	Removed paragraph and content as it was only relevant at certain points in time prior to the ending of the transitional compliance approach. For prior point in time versions of this Guideline, see Version History. Amended paragraph 104A to reflect that the transitional period ended on 30 June 2023.
Paragraph 105	Minor update to heading to better distinguish the ongoing compliance approach from the risk assessment framework that may be used by all companies. Paragraph revised to acknowledge that for some public groups there may not be much difference in Australian taxation outcomes whether a company is treated as a resident under the central management and control test of residency or not. Footnote moved up as the term 'public groups' is now used earlier in the Guideline.
Paragraph 105A	Paragraph inserted to clarify the purpose of the ongoing compliance approach for public groups. Footnote added to refer to relevant ATO guidance.
Paragraph 106	Revised to confirm the ongoing compliance approach provides circumstances in which the Commissioner will not allocate resources to review a company's residency position under the central management and control test. Paragraph renumbered from paragraph 105 for clarity.
Paragraph 107	Revised to provide circumstances in which the Commissioner will not allocate resources to review a company's residency position under the central management and control test. Renumbering of paragraph to include subparagraph 107(a) and minor grammatical and style updates for readability, including insertion of further subparagraph numbers (i) and (ii). Footnote updated to apply to the whole Guideline as the term 'tax haven' is now used in the risk assessment framework. Footnote inserted to define 'resident of a foreign jurisdiction'.

	Insertion of subparagraph 107(b) and further subparagraphs (i) and (ii), to provide circumstances in which the Commissioner will not allocate resources to review a wholly offshore operating subsidiary company's residency position for public groups. Footnote inserted to provide legislative reference. Footnotes inserted to explain concepts used in subparagraph 107(b), including 'operating business' and 'a taxation position in Australia that is sufficiently similar'.
Paragraph 107A	Paragraph renumbered and minor revisions made to confirm certain circumstances where a public group cannot rely on the ongoing compliance approach. Additional references inserted to 'any arrangement identified in a Taxpayer Alert (or similar public advice)' and 'governance' processes.
Paragraph 107B	Paragraph added to acknowledge that nothing in paragraphs 106 and 107 prevents the Commissioner from applying resources to review a company's residency position when there is a risk that any arrangements or schemes mentioned in paragraph 107A have been undertaken or entered into.
Paragraph 107C	Paragraph renumbered for readability. Footnote added to refer to relevant other ATO guidance.
Paragraphs 107D and 107E	Heading added and paragraphs inserted to provide guidance regarding evidencing falling within the ongoing compliance approach for public groups.
Paragraph 107F	Paragraph inserted to acknowledge that the Commissioner may make enquiries in the course of ordinary engagement and assurance activities to confirm that the criteria of the approach is met and that where circumstances in paragraph 107A exist, a public group cannot rely on established governance processes to demonstrate that local directors exercise independent consideration and judgment.
Paragraph 107G	Provided a reference to the risk assessment framework and comments on the relationship between the ongoing compliance approach for public groups and the risk assessment framework, including to confirm that companies that meet the requirements of the ongoing compliance approach do not need to further consider the risk assessment framework.
Appendix – Paragraphs 109 - 118	Inserted the Commissioner's risk assessment framework for the central management and control test of residency.
Throughout	Multiple minor content updates to style.

22 December 2022

Paragraph 104AA	Extended the transitional compliance approach period to 30 June 2023. Provided that the transitional period will not be extended further beyond this date.

29 June 2022

Paragraph 104AA	Extended the transitional compliance approach period to 31 December 2022.
Paragraph 107	Legislative reference in footnote 4 updated to *Income Tax Assessment (1997 Act) Regulations 2021*.
Throughout	Multiple minor content updates to style.

7 July 2021

Paragraph 7	Case citations in footnote 3 corrected.
Paragraph 63	Error in heading corrected.
Paragraph 104AA	Extended the transitional compliance approach period for companies impacted in their efforts to change their governance arrangements due to the COVID-19 pandemic and in light of technical amendments announced by the Government to clarify the corporate residency test.

13 December 2019

Paragraphs 5A, 5B	Provided commentary to state that the residency of businesses operating wholly offshore will often be regarded as a low-risk issue for the ATO because of permanent establishment/branch exemption rules and similarities to the controlled foreign company attribution regime.
Paragraphs 103, 107	Provided clarification that 'artificial or contrived arrangements' in the transitional and ongoing compliance approaches do not include flying Australian directors to attend board meetings overseas where the company has a substantive commercial presence.
Paragraph 104A	Extended the transitional compliance approach period for companies that are taking active and timely steps to change their governance arrangements in line with the approach.
Paragraph 104B	Provided that the transitional arrangement extends to the Commissioner not applying resources to pursue penalties for failing to lodge taxation documents in the approved form.
Paragraph 107	Clarified that decisions undertaken by circular resolution are captured when it is considered whether a substantial majority of central management and control is exercised in a foreign jurisdiction.
Paragraph 107A	Provided that where paragraph 107 is satisfied and the company fails to lodge a return because of an honest but mistaken belief it was a non-resident, the Commissioner will not apply resources to pursue penalties for failing to lodge taxation documents in the approved form.

References

Previous draft:

PCG 2018/D3; PCG 2018/9DC1

Related Rulings/Determinations:

TR 2004/15; TR 2018/5

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 23AH
- ITAA 1936 Part X
- ITAA 1997 830-5
- ITAA 1997 Subdiv 768-A
- ITAA 1997 Subdiv 768-G
- ITA(1997)R 2021
- ITA(1997)R 2021 Sch 3
- TAA Sch1 353-10
- TAA Sch1 353-15
- TAA Sch1 353-25
- Corporations Act 2001

Cases relied on:

- Bywater Investments Limited v Commissioner of Taxation [2016] HCA 45; 2016 ATC 20-589
- Cesena Sulphur Co Ltd v Nicholson; The Calcutta Jute Mills Company Ltd v Nicholson [1876] 1 Ex D 428
- De Beers Consolidated Mines Ltd v Howe [1903-1911] 5 TC 198
- Esquire Nominees Ltd as Trustee of Manolas Trust v Commissioner of Taxation (Cth) [1973] HCA 67; 129 CLR 177; 47 ALJR 489; 1 ALR 145; 4 ATR 75; 73 ATC 4076
- Koitaki Para Rubber Estates Limited v Federal Commissioner of Taxation [1940] HCA 33; 64 CLR 15; 6 ATD 42
- Koitaki Para Rubber Estates Limited v Federal Commissioner of Taxation [1941] HCA 13; 64 CLR 241; 6 ATD 82; [1941] ALR 125
- North Australian Pastoral Company Limited v Federal Commissioner of Taxation [1946] HCA 17; 71 CLR 623; 8 ATD 121; [1946] ALR 341
- Union Corporation Limited v Commissioners of Inland Revenue 34 TC 207; [1953] 1 All ER 729; 32 ATC 73

Other references:

- OECD, 1998, *Harmful Tax Competition: An Emerging Global Issue*, OECD Publishing, Paris
- PCG 2016/1
- PS LA 2009/4
- PS LA 2011/19

ATO references

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