PCG 2018/D3 (Finalised) - Income tax: central management and control test of residency: identifying where a company's central management and control is located

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

Relying on this draft Guideline

This Practical Compliance Guideline is a draft for consultation purposes only. When the final Guideline issues, it will have the following preamble:

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 draft 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
Possibility A 22
Possibility B 23
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
Possibility A: Abroad Co's directors merely rubberstamp decisions made by its Australian owners 35
Possibility B: Abroad Co's directors independently consider directions given to it by its Australian owners 38
Decision making within a corporate group 40

Example 7: Decision making by a subsidiary of a corporate group 42

Possibility A: Sub Co's directors make decisions in line with its parent's policies 43

Possibility B: Sub Co's CFO is an employee of its parent 45

Possibility C: Sub Co's board merely implements the decisions of its parent, Aust Co 47

Example 8: Board is required to obtain approval for major items of expenditure or decisions 49

Exercising central management and control vs day-to-day management of a company's operations 51

Example 9: Manager conducting business on company's behalf 52

Example 10: Residence of directors vs residence of a company 57

Possibility A: Stuart makes day-to-day business decisions while in Australia 59

Possibility B: Stuart begins to make high-level decisions of ByteT Co solely in Australia 61

Possibility C: Stuart continues to makes high-level decisions of ByteT Co in Foreignland 65

Example 11: ForInvest Co 66

Decisions made in more than one place 70

Example 12: Decision making outside the normal course of how central management and control is exercised 78

Possibility A 79

Possibility B 81

Example 13: Decision making equally split between more than one place 84

Possibility A 85

Possibility B 88

Example 14: Exercise of central management and control by beneficial owner 91

Possibility A: Ben does not exercise the power given to him by the constitution 94

Possibility B: Ben makes all final high-level strategic decisions 97

Transitional compliance approach 99

Ongoing compliance approach 102

Date of effect 105

Your comments **106**

What this draft Guideline is about

1. This draft Guideline contains practical guidance to assist foreign incorporated companies and their advisors to apply the principles set out in 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 draft 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 draft 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 draft Guideline are encouraged to approach the ATO to discuss their circumstances.

5. This draft 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.

Background

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

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

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 and determined by reference to:

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[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.

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

[3] See *Cesena Sulphur at 446; De Beers Consolidated Mines Ltd v. Howe* [1930-1911] 5 TC 198 *(De Beers) at 213; endorsed in North Australia Pastoral; Bywater at [45]; Esquire nominees at [27]; and in Koitaki v. FCT 1941) 64 CLR 241 per Rich ACJ at 241; Koitaki v. FCT (1940) 64 CLR 15 per Dixon J at 19-20; Union Corp at 271.*

- where it is controlled and directed as a matter of substance, and
- how its control and direction is exercised over time (see paragraph 76 of this draft 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 draft 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.

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 51 to 69 of this draft 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 paragraph 51 to 69 of this draft 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 ASX 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 two 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 51 to 69 of this draft Guideline).*

Example 2: Small investment business

21. *PrivateInvest Co conducts a small passive investment business. At any given time it holds two to three 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

22. Aside from its directors, PrivateInvest Co only has administrative staff who execute the decisions made by its directors. The directors 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. Administrative staff executing those decisions are not exercising central management and control.

Possibility B

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 and sell a single investment. SPV Co conducts no other business. After conducting the transaction SPV Co is to be wound up. The decision 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 two to three 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. The evidence establishes that at all times Abroad Co's directors:

(i) *have followed all the proposals received without deviation*

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

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

36. The directors claim that they would not implement illegal or improper transactions. 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.

37. 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

38. 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.

39. 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

40. 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.

41. 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

42. *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

43. 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.

44. 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

45. 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.

46. 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

47. 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. SubCo must also comply with any directions received from Aust Co's board.

48. 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. AustCo'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

49. *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.*

50. *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

51. 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

52. *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.*

53. *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.*

54. *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.*

55. *During board meetings, the board makes high-level decisions about MultinationalCo'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.*

56. *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: Residence of directors vs residence of a company

57. *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.*

58. *ByteT Co is offered and accepts a contract to provide consultancy services in Australia over a four month period.*

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

59. While performing the contract in Australia, ByteT Co is offered two 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 three contracts in Australia, Stuart returns to Foreignland where he continues to run ByteTCo's business as before.

60. Stuart's decision to accept two 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

61. 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. However, it requires ByteT Co to cease its prior business in Foreignland. 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.

62. 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.

63. Stuart's decision to accept the contract and change ByteT Co's business by setting up a new Australian operation, and ending its Foreignland business operation, is an exercise of its central management and control.

64. 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 makes high-level decisions of ByteT Co in Foreignland

65. Assume the same facts as possibility B, however, ByteT Co does not cease its Foreignland business. Prior to making the decision to expand ByteT Co's business to Australia, Stuart returns to Foreignland. There he consults with his professional advisors and banks, prior to making 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

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

67. *ForInvest Co delegates the management of its investment fund to AusManager Co. 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.*

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

(i) *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*

(ii) *decided to appoint AusManager Co to manage its investment fund, and*

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

69. *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.*

Decisions made in more than one place

70. 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.

71. The underlying considerations are:

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

(ii) 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.

72. 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.

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

(i) 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

(ii) 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.

74. 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.

75. 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.

76. 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:

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

(ii) 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.

77. 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:

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

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

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

(iv) 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 12: Decision making outside the normal course of how central management and control is exercised

78. *SR Co is a company incorporated in Ostasia. It carries on its substantive trading business in Ostasia. It has three directors – two 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

79. 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.

80. 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. The exercise of 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

81. 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.

82. 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.

83. 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 13: Decision making equally split between more than one place

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

Possibility A

85. 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.

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

87. 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 because:

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

(ii) *two of the directors are located in Australia when they do so.*

Possibility B

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

89. Sadie makes these decisions from her home in Ostasia and 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 two Australian directors, do not play any substantive role in its decision making.

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

Example 14: Exercise of central management and control by beneficial owner

91. *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 two directors who are resident in Foreignland.*

92. *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.*

93. *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

94. 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.

95. 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.

96. 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

97. 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.

98. 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

99. This administrative arrangement applies to 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*:

(i) had relied on TR 2004/15, and on that basis was not a resident of Australia

(ii) 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

(iii) 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 *Income Tax Assessment Act 1997* (ITAA 1997), and

(iv) would 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 is located in Australia.

100. The Commissioner will not apply his resources to review or seek to disturb a foreign-incorporated company's status as a non-resident during the transitional period (see paragraph 101 of this draft Guideline), if it meets the criteria in paragraph 99 of this draft Guideline and during this period it:

(i) changes its governance arrangements, so that its central management and control is exercised outside Australia by the end of the transitional period

(ii) does not commence carrying on business in Australia (other than because its central management and control is exercised in Australia), and

(iii) does not undertake or enter

- any artificial or contrived arrangements that affect the location of its central management and control, or
- any tax avoidance scheme whose outcome depends, in whole or part, on whether it is a resident or non-resident.

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

(i) 15 March 2017, and

(ii) 30 June 2019.

Ongoing compliance approach

102. The Commissioner acknowledges that unintended or unplanned circumstances arise from time to time which may cause the location of central management and control to be subject to question.

103. This ongoing compliance approach sets out a series of conditions which, if met by a foreign incorporated company, means the Commissioner considers it to be low risk of being a resident under the central management and control test of residency. Simply because a company does not meet these criteria does not automatically mean that the Commissioner considers it will be a resident of Australia.

104. The Commissioner will not normally apply his resources to review or seek to treat a foreign incorporated company as a resident applying the central management and control test of corporate residency for Australian tax purposes merely because part of the company's central management and control is exercised in Australia, because directors regularly participate in board meetings from Australia using modern communications technology, where all of the following criteria are satisfied on an ongoing basis:

(i) the company is

- a subsidiary of a public group
- 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 controlled foreign company

(ii) a substantial majority of the company's central management and control is exercised in a foreign jurisdiction

- where it is treated as a resident under that jurisdiction's laws for taxation purposes
- through board meetings held in that jurisdiction, and
- the majority of directors attend board meetings while present in that jurisdiction

(iii) the company has not undertaken or entered

- any artificial or contrived arrangement affecting the location of its central management and control, including previous or subsequent 'migration' of residency

- a tax avoidance scheme whose outcome depends, in whole or part, on the location of its residence
- arrangements to conceal ultimate beneficial or economic ownership, or
- arrangements involving abuse of board processes including backdating of documents or the board not truly executing its functions.

Date of effect

105. When finalised, this Guideline is proposed to apply from 21 June 2018.

Commissioner of Taxation
21 June 2018

Your comments

106. You are invited to comment on this draft Guideline including the proposed date of effect. Please forward your comments to the contact officer by the due date.

107. A compendium of comments is prepared for the consideration of the relevant Public Advice and Guidance Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments
- be published on the ATO website at www.ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

Due date: **20 July 2018**

Contact officer details have been removed following publication of the final guideline.

Amendment history

Date of amendment	Part	Comment
5 December 2018	Paragraph 101	Transitional period during which the Commissioner will not apply his resources to review or seek to disturb a foreign-incorporated company's status as a non-resident extended from 1 3 December 2018 to 30 June 2019.

References

ATOlaw topic(s)	Income tax ~~ Assessable income ~~ Residency ~~ Residence of companies International issues ~~ Residency and source ~~ Central management and control
Legislative references	ITAA 1936 ITAA 1936 6(1) ITAA 1997 ITAA 1997 830–5 Corporations Act 2001
Related Rulings/Determinations	TR 2004/15 TR 2018/5
Case references	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 [1930-1911] 5 TC 198 North Australian Pastoral Co Ltd v. Federal Commissioner of Taxation - (1946) 71 CLR 623; (1946) 20 ALJ 201; (1946) 8 ATD 121; [1946] ALR 341; [1946] HCA 17 Bywater Investments Limited & Ors v. Commissioner of Taxation; Hua Wang Bank Berhad v. Commissioner of Taxation [2016] HCA 45; 2016 ATC 20-589 Esquire Nominees Ltd v. Federal Commissioner of Taxation - (1973) 47 ALJR 489; (1973) 1 ALR 145; 73 ATC 4114; (1973) 4 ATR 75; (1973) 129 CLR 177 Koitaki Para Rubber Estates Ltd v. Federal Commissioner of Taxation (1941) 64 CLR 241; (1941) 15 ALJ 33; (1941) 6 ATD 82; [1941] ALR 125; [1941] HCA 13
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