TR 2018/5 - Income tax: central management and control test of residency

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Please note that the Government announced in the 2020-21 Budget that it will make technical amendments to clarify the corporate residency test. Practical Compliance Guideline PCG 2018/9 *Central management and control test of residency: identifying where a company's central management and control is located* and this Ruling provide our existing view on the central management and control test of corporate residency. Further guidance will be provided once legislative amendments are enacted. See Working out your residency for updates regarding our compliance approach in the interim.

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Taxation Ruling

Income tax: central management and control test of residency

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This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

Summary – what this ruling is about

1. This Ruling sets out the Commissioner's view on how to apply the central management and control test of company residency[1] following *Bywater Investments Limited & Ors v. Commissioner of Taxation; Hua Wang Bank Berhad v. Commissioner of Taxation* [2016] HCA 45; 2016 ATC 20-589 *(Bywater).*

2. This Ruling does not deal with:

- the voting power test of company residency for foreign incorporated companies[2], or

[1] Paragraph (b) of the definition of 'resident or resident of Australia' in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936).

[2] 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.

- when a company carries on a business.

Ruling

Background

3. A company is a resident or a resident of Australia under the central management and control test of residency[3] if it:

- carries on business in Australia, and
- has its central management and control in Australia.

4. Four matters are relevant in determining whether a company meets these criteria:

(1) Does the company carry on business in Australia? (see paragraph 6 of this Ruling).

(2) What does central management and control mean? (see paragraph 10 of this Ruling).

(3) Who exercises central management and control? (see paragraph 19 of this Ruling).

(4) Where is central management and control exercised? (see paragraph 30 of this Ruling).

5. Whether a company is a resident under the central management and control test of residency must be determined by reference to all the facts and relevant case law.

Does a company carry on business in Australia?

6. To be resident under the central management and control test of residency, a company must carry on business in Australia.[4]

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[3] Paragraph (b) of the definition of *resident or resident of Australia* in subsection 6(1) of the ITAA 1936. Alternatively, under this definition a company may be a resident or resident of Australia if:
(a) it is incorporated in Australia (*the incorporation test*), or
(b) its voting power is controlled by shareholders who are Australian residents and it carries on business in Australia (*the voting power test*).

[4] This Ruling is not concerned with what amounts to carrying on business. Whether a company is carrying on a business ultimately depends on an overall impression of the company's activities. However, where a limited or no liability company is established and maintained to make a profit for its shareholders, and invests its assets in gainful activities that have both a purpose and prospect of profit, it is likely to be carrying on business within the meaning of the central management and control test of company residency. In these circumstances, it is likely the other indicia of carrying on business will support this conclusion (*Brookton Co-operative Society Ltd v. FCT* (1981) 147 CLR 441 per Aicken J at 469 *(Brookton); American Leaf Blending Co Sdn Bhd v. D-G of IR* [1978] 3 All ER 1185 Per Lord Diplock at 1189 (American Leaf); *Inland Revenue Commissioners v. Westleigh Estates Company Ltd; South Behar Railway Company Ltd; Eccentric Club Ltd* [1924] 1 KB 390*)(Westleigh)*. This is so even if the company's activities are relatively limited, and its activities primarily consist of passively receiving rent or returns on its investments and distributing them to its shareholders (*Brookton per Aicken J at 469;*

7. 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.[5]

8. It is not necessary for any part of the actual trading or investment operations of the business of the company to take place in Australia. This is because the central management and control of a business is factually part of carrying on that business.[6] A company carrying on business does so both where its trading and investment activities take place, and where the central management and control of those activities occurs.[7]

9. Central management and control of a company is not necessarily exercised where the trading or investment activities of the company are carried on.[8]

What does central management and control mean?

10. Central management and control refers to the control and direction of a company's operations.[9] It does not refer to a physical location in which the control and direction of a company is located, and may ultimately be exercised in more than one location.[10]

11. The key element in the control and direction of a company's operations is the making of high-level decisions that set the company's general policies, and determine the direction of its operations and the type of transactions it will enter.[11]

Westleigh; *Lilydale Pastoral Co. Pty. Ltd. v. FCT* 87 ATC 4235; *American Leaf*; *FCT v. Total Holdings* 79 ATC 4279; *FC of T v. E A Marr & Sons Sales Ltd* (1984) 2 FCR 326 at 330-1; 84 ATC 4580 at 4585-4586.

[5] *Malayan Shipping Co Ltd v. Federal Commissioner of Taxation* (1946) 71 CLR 156 (*Malayan Shipping)* at 159–160 where in applying the central management and control test of residency Williams J stated: 'But if the business of the company carried on in Australia consists of or includes its central management and control, then the company is carrying on business in Australia and its central management and control is in Australia'; Endorsed in *Bywater* at [57]. See also *Union Corp* at 271.

[6] See *Cesena Sulphur Co Ltd v. Nicholson; The Calcutta Jute Mills Company Ltd v. Nicholson (*1876) 1 Ex.D 428 (*Cesena Sulphur) at 446; De Beers Consolidated Mines Ltd v. Howe* [1930-1911] 5 TC 198 *(De Beers) at 213; endorsed in North Australian Pastoral Co Ltd v. FCT* (1946) 71 CLR 623 (*North Australian Pastoral); Bywater at [45]; Esquire Nominees Ltd v. FCT* [1973] HCA 67; (1973) 129 CLR 177 *(Esquire) at [27]; and in Koitaki v. FCT* (1941) 64 CLR 241 (Koitaki) per Rich ACJ at 241*; Koitaki v. FCT* (1940) 64 CLR 15 per Dixon J at 19-20*; Union Corporation Limited v. Commissioners of Inland Revenue* (1945-1953) 34 TC 207 (*Union Corp) at 271.*

[7] *Malayan Shipping* at 159-160. See also *De Beers at 213; North Australia Pastoral; Bywater at [45]; Cesena Sulphur at 446: Esquire nominees at [27]; and Koitaki.*

[8] *Bywater; Koitaki; Malayan; De Beers; Cesena Sulphur.*

[9] *Bywater* at [40]; *Malayan Shipping*; *Waterloo Pastoral Co Ltd v. FCT* (1946) 72 CLR 262 *(Waterloo Pastoral)*; *Todd v. The Egyptian Delta Land and Investment Co Ltd* (1928-29) 14 TC 119 *(Egyptian Delta)*; *Cesena Sulphur* at 444.

[10] See paragraphs 30 and 31 of this Ruling.

[11] *Bywater* at [41].

12. The control and direction of a company is different from the day-to-day conduct and management of its activities and operations.[12] The day-to-day conduct and management of a company's activities and operations is not ordinarily an act of central management and control.[13] Nor is the management of day-to-day activities under the authority and supervision of higher-level managers or controllers.[14]

13. The day-to-day conduct and management of a company's operations might be an exercise of central management and control in circumstances where they are effectively the same. For example, for a small passive investment company with a very small number of investments, the decisions to make, hold and dispose of those investments, would be both the day-to-day management and the central management and control of the company.[15]

14. Merely because a person is a majority shareholder, or has the power to appoint those who control and direct a company's operations does not, by itself, mean the person controls and directs a company's operations and activities.[16]

What is 'decision making'?

15. A person, or group of people, make a decision if they actively consider and decide to do, or not do something based on it being in the best interests of the company.[17] It does not include the mere implementation, or rubberstamping, of decisions made by others (see paragraphs 26 to 29 of this Ruling).

Acts of central management and control

16. Exercising central management and control of a company can involve:

- setting investment and operational policy[18] including:
  - setting the policy on disposal of trading stock, and/or the use and development of capital assets[19]
  - deciding to buy and sell significant assets of the company[20]

[12] *Bywater;* Koitaki at 248.
[13] *Bywater; Koitaki* at 248.
[14] *Bywater; Koitaki* at 248.
[15] See for example *Wood v. Holden (Inspector of Taxes)* [2006] EWCA Civ 26 (*Wood v. Holden*); *Fundy Settlement v. Canada* [2012] 1 SCR 520 (*Fundy Settlement)*.
[16] *Bywater*; *Esquire* at [28]; *New Zealand Forest Products Finance NV v. Commissioner of Inland* Revenue (1995) 17 NZTC 12,073.
[17] *Bywater* at [73] [75].
[18] *Bywater* at [45]; *De Beers* at 213; *Koitaki v. FCT (1940) 64 CLR 15* per Dixon J.
[19] *De Beers* at 213.
[20] *Wood v. Holden*; *De Beers* at 213.

- appointing company officers and agents and granting them power to carry on the company's business (and the revocation of such appointments and powers)[21]
- overseeing and controlling those appointed to carry out the day-to-day business of the company[22], and
- matters of finance[23], including determining how profits are used and the declaration of dividends.[24]

Matters of company administration

17. Matters of company administration are not acts of central management and control. These include:

- keeping a company's share register, including registering transfers of shares[25]
- keeping and adopting a company's accounts[26]
- where a company pays dividends[27], and
- the minimum acts necessary to maintain a company's registration.[28]

The relevance of a company's activities

18. The nature of a company's activities and business define which acts and decisions are an exercise of the central management and control of that company.[29] For example, where a company is a special purpose vehicle set up to conduct only two transactions – to buy and sell an asset – the decisions to buy and sell will be the only activities relevant to central management and control.[30] For a company carrying on an ongoing business of mining and selling diamonds, the relevant decisions include determining policies on the operation and development of mines, and the sale of the mined diamonds.[31]

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[21] *Bywater* [43], [45]; *Cesena Sulphur* at 455,
[22] *Koitaki*; *BW Noble Ltd v. Mitchell* (1926-27) 11 TC 372 (*BW Noble*); Cf *Mitchell v. Egyptian Hotels (*1911-15) (1915) AC 1022 (Egyptian Hotels).
[23] *Koitaki* per Dixon J.
[24] *Bywater* [45]; *De Beers* at 213.
[25] *The Swedish Railway Company Ltd v. Thompson (HM Inspector of Taxes)* (1923-25) 9 TC 342 (*Swedish Railway*) at 355.
[26] *Swedish Railway* at 355; *Egyptian Hotels* at 545-546.
[27] *Swedish Railway* at 355.
[28] *Egyptian Delta* at 142; *Union Corp* at 270.
[29] *Bywater* at [85] [125]; *Waterloo*; *North Australian Pastoral*; *Wood v. Holden.*
[30] *Wood v. Holden.*
[31] *De Beers.*

Who exercises central management and control of a company?

19. Identifying who exercises central management and control is a question of fact. It cannot be determined solely by identifying who has the legal power or authority to control and direct a company.[32] The crucial question is who controls and directs a company's operations in reality.

A starting point

20. Normally, where a company is run by its directors in accordance with its constitution and the company law rules applicable to that company[33], which give its directors the power to manage the company, the company's directors will control and direct its operations.[34] It follows that ordinarily it is a company's directors who exercise its central management and control.

21. However, the actions of a company's directors, or others with the legal power and authority to control and manage the company, are not the end of the enquiry as to who exercises central management and control. There is no presumption that the directors of a company will always exercise its central management and control.[35]

22. When determining who exercises a company's central management and control, all the relevant facts and circumstances must be considered. Facts and circumstances to be considered in determining who exercises a company's central management and control include the role of anyone who assumes the role of the directors' role in managing and controlling the company's affairs or has a role[36] in the decision-making processes or governance of the company.[37]

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[32] *Bywater* at [40] 113]; *Unit Construction Co Ltd v. Bullock (Inspector of Taxes)* [1960] AC 351; at 362-363 (AC reports); [1956-60] 38 TC 712 *(Unit Construction)*; *De Beers.*

[33] For example see section 198A of the *Corporations Act 2001*.

[34] *Bywater* at [41].

[35] In *Bywater* at [77] the High Court confirmed that the question of central management and control should not be approached on the premise that the directors of a company will exercise central management and control, unless an exception is established. The High Court observed that such an approach is inconsistent with the factual nature of the test and is unhelpful for identifying where a company's central management and control is actually located.

[36] *Bywater.*

[37] *Bywater* at [41], [70]; *Unit Construction; Wood v. Holden; De Beers; Cesena Sulphur; Koitaki; Esquire; Malayan Shipping.*

Mere legal power or authority to manage a company is not sufficient to establish exercise of central management and control

23. A person who has legal power or authority to control and direct a company, but does not use it, does not exercise central management and control.[38] For example, in *Bywater*, the court disregarded the role of those directors who were formally appointed but did not play any real role in the affairs of the company.

Tacit control and delegated authority

24. A person may control and direct a company without actively intervening in the company's affairs on an ongoing basis provided they[39]:

- have appointed agents or managers whom they tacitly control to conduct the company's day-to-day business
- tacitly control and regularly exercise oversight of the affairs of the company, including monitoring the company's performance, and
- do not need to actively intervene because the company's affairs are running smoothly and in the manner they desire.

Legal authority or power is not necessary for a person to exercise central management and control

25. A person without any legal power or authority to control or direct a company may exercise central management and control of that company.[40]

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[38] *Bywater*; *Unit Construction*; *Fundy Settlement*; *Egyptian Hotels* at 551; *BW Noble* at 412.
[39] *BW Noble* at 412.
[40] *Bywater* at [59], [67], [69], [113], [121]; *Unit Construction* at 362-362*; Fundy Settlement* at 526; De Beers at 213.

Company outsiders – is a person merely influential over decision makers or do they exercise central management and control of that company?

26. An outsider who merely influences those with legal power to control and direct a company, even if they can and do exert strong influence, is not the relevant decision maker and does not exercise central management and control of the company.[41] However, if an outsider is more than merely influential, and actually dictates or controls the decisions made by the directors, the outsider will exercise central management and control of the company.[42]

27. The distinction turns on what amounts to decision making for the central management and control test of residency. In *Bywater*, the High Court observed that this turns on whether the people *said* to make the decisions of the company, *actually consider* whether to do what they are told, or are advised to do, and make a decision to do it because it is in the best interests of the company. If they do, they are the relevant decision maker and exercise central management and control of the company.[43] If they do not, and merely mechanically implement or rubberstamp company decisions already made by others based on what they are told or advised to do, the person who gave the instruction is the real decision-maker and exercises central management and control of the company.[44]

28. It is relevant to consider whether the directors would refuse to follow advice or directions of outsiders that are improper or inadvisable.[45] If they would, it is more likely the directors are the real decision makers. If not, it is more likely the outsider who exercises central management and control.

29. The directors' knowledge of the business is also relevant. A lack of knowledge of the business sufficient to enable them to determine if following advice or instructions would be improper or inadvisable, suggests they are not the real decision makers and are more likely rubberstamping or implementing decisions already made by others.[46]

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[41] *Bywater at 73; Esquire at* 190-191; *Her Majesty's Revenue and Customs Commissioners v. Smallwood* [2010] EWCA Civ 778 (*Smallwood*) *and Wood v. Holden.*
[42] *Bywater.*
[43] *Wood v. Holden; Esquire; Smallwood;* Cf *Bywater.*
[44] *Bywater* at [73].
[45] *Esquire* at 190-191; *Hua Wang Bank Berhad v. Commissioner of Taxation* [2014] FCA 1392 at 416 (Hua Wang).
[46] *Hua Wang Bank.*

Where is central management and control of a company exercised?

30. A company will be controlled and directed where those making its high-level decisions do so as a matter of fact and substance. It is not where they are merely recorded and formalised[47], or where the company's constitution, bylaws or articles of association require it be controlled and directed, if in reality it occurs elsewhere.[48] This will not necessarily be the place where those who control and direct a company live.[49]

Multiple places of central management and control

31. Control and direction of a company may be undertaken by those controlling a company in multiple places. This means a company's central management and control may be divided between more than one place.[50] However, a company's central management and control will only be exercised in a place for the purpose of the central management and control test if it is exercised in that place to a substantial degree, sufficient to conclude the company is really carrying on business there.[51]

Relevance of a company's activities

32. Central management and control of a company is not necessarily exercised where the trading or investment activities of the company are carried on.[52] However, the nature of a company's business activities may dictate where its key decisions must be made as a matter of practice.[53]

33. In *North Australian Pastoral* and *Waterloo Pastoral,* the practical need to make the key high-level decisions where its day-to-day operational activities occurred, heavily influenced the court's conclusion that the central management and control of the company was exercised where its operational activities took place.

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[47] *Bywater* at [51], [56]*; Fundy Settlement; John Hood & Company Ltd v. Magee* (1913-1921) 7 TC 327 (*John Hood)* at 357.
[48] *Bywater* at [40], [121]; *Unit Construction* at 741*; De Beers* at 213.
[49] *John Hood*; *North Australian Pastoral*; *Waterloo Pastoral*.
[50] *Swedish Railway* at 372 and 375*; Koitaki at 248-9; Re Little Olympian Each Ways* Ltd [1994] 4 All ER 561 (*Little Olympian)* at 569*; Egyptian Delta at 128-130; Union Corp at 267.*
[51] *Union Corp* at 271; *Koitaki* at 248-9.
[52] *Bywater; Koitaki; Malayan; De Beers; Cesena Sulphur; Wood v. Holden; Fundy Settlement.*
[53] *Waterloo Pastoral; North Australian Pastoral.*

Residence of directors vs residence of a company

34. Where a company's central management and control is exercised is not determined by where the directors, or other persons, who control and manage it, are resident or live.[54] What matters is where they actually perform the activities to control and direct the company.

Relevant considerations

35. No single factor alone will necessarily determine where central management and control of a company is exercised.[55] The relevance and weight to be given to each will depend on the facts and circumstances of the case and surrounding circumstances.[56]

36. The matters most likely to influence a court's decision, as to where those who control and direct the operations of a company do so from, are:

- where those who exercise central management control do so, rather than where they live[57]
- where the governing body of the company meets[58]
- where the company declares and pays dividends[59]
- the nature of the business and whether it dictates where control and management decisions are made in practice[60]
- minutes or other documents recording where high-level decisions are made.[61]

37. Other matters, of lesser weight, the courts have considered in analysing where a company's central management and control is exercised include:

- where those who control and direct the company's operations live[62]
- where the company's books are kept[63]
- where its registered office is located[64]
- where the company's register of shareholders is kept[65]

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[54] *John Hood.*
[55] See for example *Bywater; Swedish Railway* at 386; *Unit Construction; North Australian Pastoral.*
[56] *Little Olympian* at 569.
[57] *John Hood; North Australian Pastoral; Waterloo Pastoral.*
[58] *Bywater* at [44], [53], [116]*; John Hood* at 357.
[59] *Bywater* at [44]; *John Hood* at 357.
[60] *North Australian Pastoral* at 633-634; *Waterloo Pastoral*.
[61] *John Hood* at 357; *Koitaki*; *Bywater.*
[62] *Bywater* at [58]; *Koitaki; North Australian Pastoral.*
[63] *Bywater* at [43], [116].
[64] *Bywater* at [43],[116].

- where the shareholder's meetings are held[66]
- where its shareholders reside.[67]

38. These factors are used to help identify where a company's directors, or others, actually make its high-level decisions and in doing so where they actually manage and control the company.

Date of effect

39. This Ruling applies from 15 March 2017.

40. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation
21 June 2018

[65] *Bywater* at [46]; *Koitaki.*
[66] *Bywater* at [46] [116]; *John Hood* at 357; *Koitaki; Cesena Sulphur* at 446.
[67] *Bywater* at [116].

Appendix 1 – Detailed contents list

41. The following is a detailed contents list for this Ruling:

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- Cesena Sulphur Co Ltd v. Nicholson; The Calcutta Jute Mills Company Ltd v. Nicholson (1876) 1 Ex.D 428 (Cesena Sulphur) at 446
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- Koitaki Para Rubber Estates Ltd v. Federal Commissioner of Taxation - (21 April 1941) - (1941) 64 CLR 241; (1941) 15 ALJ 33; (1941) 6 ATD 82; [1941] ALR 125; [1941] HCA 13
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