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Guernsey companies: UK tax residence considerations

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Introduction

It has been a long-established principle of UK tax law that a Guernsey company, as any other non-UK company, will be treated as being UK tax resident for a particular financial year if the "central management and control" (CMC) of that company is exercised within the UK during that financial year[1].

Whether CMC of a Guernsey company is exercised in the UK is question of fact. This briefing summarises UK tax residence points arising out of UK tax case law, focussing in particular on the most recent case of *Development Securities (No. 9) Ltd and other v HMRC*[2], and also provides some practical guidance on how Guernsey companies can minimise UK CMC risks when there is no intention to make the company UK tax resident.

UK tax case law

CMC is generally regarded as being the superior and directing authority of a company, rather than the day-to-day execution of the company's business, although the two may often be vested in the same person or body of persons. CMC is manifest in the authority which decides upon strategic matters relating to the company's business. Such strategic decisions include whether the company should continue to carry on an existing business or diversify into other activities, whether the company should carry on business at all, and how the business of the company should be financed.

In each case CMC is a question of fact, although it is clear from the case law, and in particular from the case of *Wood and another v Holden*[3], that emphasis is placed on meetings or other decisions of the board of directors in determining who exercises CMC (provided that the directors are genuinely making decisions and not "rubber-stamping" the decisions of another), as typically, it will be the company's board of directors that, at meetings of the board, take strategic decisions on the conduct of the company's business.

The articles of incorporation of a company will be a factor taken into account in determining who exercises CMC. Where the company's articles vest the power to manage and control the company's business in a particular body (typically the board of directors) it will normally be presumed that the company is centrally managed and controlled by that body unless the facts demonstrate the contrary.

However, it is possible for a person who is not a director to usurp the power of the directors, and themselves exercise the CMC of a company. In the case of U*nit Construction Co. Ltd v Bullock*[4] it was found on the facts that the CMC of a non-UK subsidiary was in fact exercised in the UK by the board of the UK parent, even though this was in breach of the subsidiary's articles which contained a provision that CMC was to be exercised by the directors otherwise than in the UK.

Furthermore, in the case of *Laerstate BV v The Commissioners for Her Majesty's Revenue & Customs*[5] it was found on the facts that the CMC of the company in question was exercised by a shareholder (Mr Bock) in the company's parent (Mr Bock was also a director of the company for some, but not all, of the

1 De Beers Consolidated Mines v Howe [1906] AC 445.
2 [2017] UKFTT 0565.

3 [2006] EWCA Civ 26, [2006] STC 443.
4 [1960] AC 351; 38 TC 712.
5 [2009] UKFTT 209 (TC).

periods in question), either because he was a director who made strategic decisions, or (when he was not a director), because he directed the decisions of the actual director, who implemented those directions without consideration.

Most recently, in the case of *Development Securities (No. 9) Ltd* it was found on the facts that the CMC of Jersey companies was exercised in the UK by their UK parent, although a majority of directors of the Jersey companies were Jersey resident and all board meetings were held in Jersey. In finding that the CMC of the Jersey companies was in fact located in the UK, the tribunal took into account that the Jersey companies were established to implement one transaction and that the transaction effected by the Jersey companies (acquiring assets from their UK parent at a price in excess of market value) was so uncommercial that it required shareholder consent.

The tribunal also considered that the Jersey directors had no evidence that they had considered the merits of acquiring the assets at an overvalue, and that as the overall arrangements had been decided by the UK parent in advance of establishing the Jersey subsidiaries, the strategic decisions of the Jersey companies to acquire the assets were really taken by the UK parent, and that in reality the Jersey directors were "simply administering a decision they had been instructed to undertake".

This case therefore takes the concept of usurping the board further than previous cases. In *Unit Construction Co. Ltd*, the board of the subsidiary in question never actually met during the relevant period, so that it was clear that the board of the parent, in taking the decisions that it took, had usurped the board of the subsidiary. In *Laerstate BV*, the director(s) did meet, although it was clear on the facts that a Mr Bock was making the strategic decisions. However, in D*evelopment Securities (No. 9) Ltd*, the concept of usurping the board is taken further as although the directors of the Jersey companies did meet and make decisions in Jersey, the tribunal found that, as a matter of fact, they were really administering the decisions of the parent.

In reaching its decision in *Development Securities (No. 9) Ltd* the tribunal examined in detail the various documents and correspondence related to the transactions, including the board minutes of the Jersey companies and the handwritten notes of an employee present at the board meetings. The tribunal found that these notes suggested that it was inevitable that the plan was to be implemented by the Jersey companies and that the directors did not consider the commerciality and merits of the decision to implement the plan. The tribunal also found that where CMC abides is determined on a "scrutiny of the course of the business… informed by what had taken place immediately prior to incorporation" i.e. takes into account the tax planning arrangements of the UK plc. It should be noted that *Development Securities (No. 9) Ltd* is a tax avoidance case and is likely to be appealed.

Practical points

There are a number of practical points that directors, advisors and service providers of Guernsey companies should consider in minimising risks that CMC could be located in the UK. It should be noted that it is possible for a Guernsey company to have CMC located in both the UK and Guernsey at the same time, and so the best way to minimise the risks is to ensure that, factually, no strategic decision-making can be said to take place in the UK.

The following practical points are relevant:

- The majority of the directors of a Guernsey company should be resident outside the UK. Where a committee of directors is appointed in relation to a specific matter, the majority of the members of that committee should also be resident outside the UK;
- Board and committee meetings should not take place if the majority of directors or committee members present are UK tax resident;
- All board and committee meetings should occur outside the UK;
- No director or committee member should attend a board or committee meeting whilst physically present in UK;
- No director or committee member should sign a written resolution whilst physically present in the UK;
- Directors and committee members should have the necessary and relevant background and expertise, including sufficient expertise to make commercial decisions for the company;
- All strategic and commercial decisions should be made by directors or committee members, who should have timely access to all relevant information that can allow them to make an informed decision. Directors and committee members should genuinely take these decisions after serious and proper consideration, including an assessment of merits and benefits of the decision for the Guernsey company and the wider group (especially if there is a risk that the decision could be seen as uncommercial or as a disadvantage the company);
- Detailed board and committee minutes should be kept, especially if there is any question as to whether a decision is commercial and/or in the interests of the company. If draft minutes are prepared in advance they should be treated as an agenda and not be followed to the letter. Any draft minutes should be revised following the meeting to reflect the actual discussions. Ideally any draft minutes prepared in advance should be prepared by Guernsey counsel; and

Continued

- What happens outside board and committee meetings is important and so handwritten notes, emails and other documents relating to the matters to be discussed at meetings could be scrutinised as well as the board and committee minutes. Loose terminology and inaccuracies in correspondence, minutes and other related documents must be avoided as these could infer that the directors or committee members were just administering the decision of another (e.g. where emails in advance of the meeting suggest that the directors or committee members will make a particular decision) or had not fully considered matters (e.g. errors in the minutes could infer a lack of attention).

Essentially, these last four points are examples of good corporate governance and directors, advisors and service providers of Guernsey companies will be mindful of these points in any event as part of maintaining high standards of corporate governance.

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