# DETERMINING COMPANY RESIDENCE AFTER WOOD V. HOLDEN[1]

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## The Facts

The basic facts of the case are quite straightforward. Mr. and Mrs. Wood were settlors of a number of different trusts set up in the British Virgin Islands in 1995. These trusts owned all the shares in a company called Copeswood Investments Limited ("CIL"), a British Virgin Islands company. By the end of October 1995 CIL owned 49.99% of the shares in a company called Ron Wood Greeting Cards Holdings Limited ("Holdings"). This is a UK company. CIL acquired these shares by way of a gift from Mr. and Mrs. Wood.

Holdings held 96.24% of the shares in another UK company called Ron Wood Greeting Cards Limited ("Greetings").

On 18 July 1996 CIL acquired all of the share capital of a Dutch company, Eulalia Holdings BV ("Eulalia"). A Dutch company, ABN Amro Trust Limited ("ABN Amro") was appointed as the sole managing director of Eulalia.

The Commissioners accepted (para.129 of their Decision) that at the time of its acquisition on 18 July 1996 Eulalia was resident in the Netherlands.

On 23 July 1996, CIL sold to Eulalia all of CIL's shareholding in Holdings for substantial consideration. Additionally, in the event of a sale within three years at a price in excess of that consideration, 95% of the excess would also have to paid over by Eulalia to CIL.

On 21 October 1996, Eulalia sold its 49.99% shareholding in Holdings to a company called Birthdays Group Limited for a greater consideration than Eulalia had paid to CIL. The excess consideration clause became effective. CIL therefore received a further payment from Eulalia in respect of the shares in Holdings.

The central issue in this case was whether CIL made a chargeable gain when it sold its 49.99% shareholding in Holdings to Eulalia on 23 July 1996.

## The Statutory Provisions

The relevant provisions are ss.13 and 14 TCGA 1992. Section 13 TCGA 1992, if it applied, would attribute the gains that arose to CIL (on its disposal of Holdings shares to Eulalia) to the non-resident trustees who were participators in CIL. Further, by virtue of s.86 TCGA 1992 those gains would be attributable to, and chargeable on, the settlors, Mr. and Mrs. Wood.

Section 14 TCGA 1992 provides, for the purposes of s.13 TCGA 1992, that no gain arises on a disposal by one company to another provided that both companies are in a non-resident group of companies (defined by s.14(4)(a) TCGA 1992).

There is no issue that Eulalia and CIL were members of a group: CIL held more than 75% of Eulalia. However, the issue is whether they were both non-resident at the date of the disposal by CIL to Eulalia of CIL's holding in Holdings. If they were both

non-UK resident, s.14 TCGA applied and no gains would arise on CIL's disposal to Eulalia.

**The law on Company Residence**

The residence of a company is generally determined using the common law rules. Broadly stated, a company is resident where its central management and control abides. In the absence of any provisions in the Articles of Association, a company is generally resident, therefore, where its Board of Directors meets. It is the place of strategic management, rather than the place of day-to-day management, that determines where the control and management of a company actually abides.

However, this principle is displaced if the Board of Directors is not actually acting as such. *Unit Construction Company Ltd v. Bullock*[2] is authority for the proposition that if the Board of Directors of a subsidiary stands aside altogether so that the parent company effectively usurps what, in theory, is the function of the Board of Directors of the subsidiary, then it cannot be said that the central management and control of the subsidiary abides where the Board of Directors of the subsidiary meets.

This principle does not, however, apply where the subsidiary's Board of Directors still exercises central management and control but does so under the influence of or with guidance from the parent company.

The Revenue's case, stated broadly, was that Eulalia was resident in the UK because its sole director was told what to do by Mr. Wood and Price Waterhouse (Mr Wood's Accountants) and that it fell in with their wishes: in effect, therefore, no real decisions were taken in the Netherlands. Further, the Revenue claimed that since Eulalia was only involved in order to carry out a tax scheme, there was never any possibility that Eulalia's sole director would prevent Eulalia playing its part in the tax scheme.

**The Judgment**

In a typically thorough and clear judgment, Park J. held that:

> "On a proper application of the law to the facts, the only tenable conclusion for the Commissioners to reach was that, under the common law of residence, Eulalia was resident in the Netherlands."

Park J. had considerable sympathy for the taxpayer's complaint that there was an evident inconsistency between the Revenue's attitude to the residence of CIL and its attitude to the residence of Eulalia. In order for a s.13 TCGA 1992 claim to stand in respect of the gains arising to CIL, CIL would have to be non-resident. However, Park J. held that there was no realistic difference between CIL and Eulalia as respects whether they were resident in the UK at the time of the disposal of the Holdings shares by CIL to Eulalia. He stated, at para.39:

> "Both companies were established or acquired abroad in order to implement particular parts in the wider tax scheme of which the architects were Price Waterhouse. Both were managed in the offices of overseas financial organisations: CIL in the Geneva offices of Barclay Trust and Eulalia in the Amsterdam offices of

> AA Trust. [Counsel for the taxpayer's] point is that, if CIL was resident outside the United Kingdom (which the Revenue not merely accept but assert as an essential ingredient in the claim for tax which they advance against Mr. & Mrs. Wood), then there is no credible basis on which it can be said that Eulalia was resident in the United Kingdom."

Park J., however, observed that this point was rather in the nature of a complaint than a reason for allowing the appeal.

Park J. rejected the Revenue's claim that the sole director of Eulalia did not in fact take the decisions but did what it was told to do by Mr. Wood or by Price Waterhouse acting on his behalf: all the documentary evidence showed that there was absolutely no assumption on the part of Price Waterhouse that Eulalia would necessarily sign each document as and when it was presented to it.

Further, Park J. rejected the proposition advanced by the Revenue that a professional adviser such as the architect of the scheme at an accountancy firm could be the person exercising central management and control of Eulalia. He stated that such professional advisers:

> "… are in no position to give orders to major banks and trust companies. It is inherently unlikely that [the professional adviser] did anything of the sort, and all the evidence of the communications with [the sole director of Eulalia] showed that he did not." (para.42)

Park J. further rejected the Special Commissioners' finding at para.125 that the meetings and decisions of Eulalia's sole director were mere legal formalities and could be ignored. He stated at para.43:

> "Without decisions by AA Trust in its capacity as managing director of Eulalia to enter into the agreement to purchase the holding in Holdings and into the later agreement to sell that holding those agreements would not have been made. There can be no doubt that AA Trust took these decisions in Amsterdam and nonetheless so by reason of having been recommended to take the decisions by Price Waterhouse in Manchester."

Park J. accepted the taxpayer's submission that given that the Commissioners had found Eulalia to have been resident in the Netherlands until 18 July 1996, that it was incumbent on the Revenue to produce at least some material to show a change of residence.

Further, Park J. noted with regard to the number and frequency of Board meetings:

> "… the Commissioners say that in para.SC136 that the only activity of Eulalia between its acquisition by CIL and the sale of its shares in Holdings was the acquisition and sale of those shares and the matters connected therewith. They add: "There was nothing else to manage." That is true, but how does it show that Eulalia was resident in the United Kingdom or that it was not resident in the Netherlands? What Eulalia did was a big transaction in terms of the amounts involved, but it did not require frequent or intensive control and management, and if all the evidence that there is shows

> that such decisions as were needed were made in the Netherlands, the conclusion must surely be that the company was resident in the Netherlands." (para.49)

Further, at para.51, Park J. accepted the proposition that although subsidiaries are set up with the general expectation that they will comply with the requirements of the parent company, this does not mean that they are not resident in their own jurisdictions.

**Comments**

This case is important for several reasons. First, it exemplifies the fact that all situations must be looked at in a realistic way. It is unrealistic to say that a tax scheme created by a UK adviser will necessarily affect the residence of all the companies that participate in that scheme. Additional evidence is required to the effect that the directors of the companies that take part in such a tax scheme have abdicated all control and management over their respective subsidiaries and have allowed the parent or another person to usurp central management and control.

Secondly, this is yet another case in the line of cases (such as *Re Little Olympian Each Ways Ltd*[3], *New Zealand Forest Products*[4], *Esquire Nominees*[5] and *Untelrab v McGregor*[6], which state the important principle that influence is not the same thing as control: a Board of Directors may act under the influence of another person or persons but that does not necessarily mean that the Board of Directors has ceased to exercise central management and control.

Third, and this will be a balm to most tax planners, it is not necessary to have reams of paper to demonstrate intense activity in a company where the business of the company does not require it. The Revenue seemed to suggest in this case that the absence of intense activity by the sole director of Eulalia meant that Eulalia could not possibly be resident where the sole director took its decisions.

Park J. rejected this argument. The absence of intense activity is irrelevant. Provided that what a company must do in order to conduct its business is actually done where the directors meet, that company is resident in the territory in which the directors meet.

Fourth, that although a subsidiary may be willing to carry out the wishes of the parent company, the subsidiary does not, as a result of such complaisance, cease to be resident in the territory in which its directors meet. What is required is for the directors of that subsidiary to give up all control and management duties and to allow their role to be usurped by the directors of the parent company.

Finally, if the directors of an overseas company sign documents without thinking about them, it is difficult to say that the jurisdiction in which those directors meet is the jurisdiction of the residence of the company. However, if such directors do apply their minds and do think about the documents that they are asked to sign and take a decision about whether or not to sign them, the company is resident in the place where the directors take such decisions.

The Revenue have appealed Park J's judgment. The case will be heard in the latter part of November this year.

[1] This article has appeared in the Autumn 2005 Issue of the STEP Magazine.
[2] [1960] AC 351
[3] [1995] 1 WLR 560
[4] (1995) 17 NZTC 12, 073
[5] (1971) 129 CLR 173
[6] [1996] STC (SCD) 1