

# Where does a company reside for tax purposes?

Australia levies tax on its residents. But how can a company 'reside' anywhere for tax purposes? And can a company 'reside' in Australia if its directors and or shareholders are overseas?

Section 6(1) of the *Income Tax Assessment Act 1936* (Cth) defines a "resident of Australia" to include a company that has not been incorporated in Australia, so long as that company carries on business in Australia and satisfies one of the following two conditions:

- the company has its central management and control in Australia, or
- the company's voting power is controlled by shareholders who are residents of Australia.

On 7 July this year the ATO issued an update to Practical Compliance Guideline PCG 2018/9 further clarifying the ATO's views on the 'central management and control' test ("CMT").

The issue is not without relevance in the self managed superannuation area as well. To enjoy the concessional tax benefits an SMSF must be an Australian superannuation fund which it won't be if its CMT is not in Australia.

Let's review the ATO's latest dissertation on the subject

## **What constitutes the central management and control of a company?**

The central management and control of the company is one of those principles that is more clearly defined by what it's not, rather than what it is. The day-to-day management of the company is not an exercise of central management and control.

Rather, CMT is the high-level decision-making which needs to be undertaken in Australia for the company to be classified a resident. This is a question of fact. The most obvious form of evidence that will be used to answer this question of fact is the company's board minutes, which are treated as prima facie evidence for the location of central management and control.

Other evidence might include general company documentation, correspondence and sworn statements.

CMT must occur over time. A one-off decision or meeting is not, by itself, sufficient to move the location of CMT, unless that decision was particularly substantial.

### **What if high-level decisions are regularly made in more than one place?**

What if, for example, the directors conduct their meeting via Zoom because they're in different countries? The ATO is of the opinion that the key question is not where the directors are located, but where the decisions are being made "as a matter of substance". This is a vague and broad formulation, in part because the legal principle at play can't be determined in the abstract with any greater specificity.

The 'substance' formulation is given some detail by an inquiry into whether management and control has been exercised in a location "to a substantial degree". However, in light of the fact that management and control can be "divided and located in multiple places," this test of 'substantial degree' seems to suggest that central management can be located just about anywhere so long as the 'substance' of the decision crosses a certain threshold. The ATO's reluctance to measure that threshold is somewhat problematic.

### **Who participates in the central management and control of the company?**

Section 9 of the *Corporations Act 2001* (Cth) provides a notoriously wide definition of "director". It captures not just those who are formally appointed to the office, but also those who "act in the position of a director" (i.e. 'de facto directors') and those who instruct formally appointed directors (i.e. 'shadow directors').

De facto directors are those exercising the powers of a director while trying to avoid incurring director's liability. If it walks and talks like a director, then it's a director.

Shadow directors are those who give instructions or directions to the actual board which the board are "accustomed" to following. A shadow director "is the outside person that calls the tune" that the directors dance to.

In short, a de facto or shadow director may impact the location of the company's central management and control.

The ATO holds the view that a person who has "apparent authority" in high-level decision making, they may influence the determination of the location of the company's central management and control.

### **Summary**

The Australian Government, in its 2020-21 Budget, indicated that it would be making technical amendments to clarify the corporate residency test. This clarification would be particularly welcome when determining whether decisions are substantial enough to change the location of CMT.

The above analysis summarises the ATO's current view on the central management and control test of corporate residency and has relevance in the SMSF sphere.

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