COMPANY RESIDENCE ISSUES

There have been some tax cases in recent years where offshore companies have been challenged by HM Revenue & Customs (HMRC) as being UK resident for UK Corporation Tax purposes. The essence of the cases is – Where are the fundamental decisions about the company taken?

The most notable cases are Wood v Holden (2006) and Laerstate BV v HMRC (2009). This article provides a summary of the important aspects of control and management and some practical advice to ensure an offshore company does not inadvertently become UK resident for Corporation Tax purposes.

Control and Management

Concerns arise where there are directors or shareholders resident in the UK who have too much influence over the management of offshore companies.

If the central control and management of an offshore company is carried out in the UK, then the company itself will be UK tax resident under existing longstanding UK case law. 'Control and management' refers to the highest decision-making level, and need not even involve the directors themselves if they usually follow the effective instructions of another person who is UK resident, or if their decisions are dictated or overseen by UK residents in some other way that inhibits their freedom.

If there are directors or shareholders in the UK, then a key question is whether they control the decision-making process from the UK, or whether the remaining or actual offshore directors are making genuinely independent decisions and have the requisite skills and experience to act on their own authority.

It is important to remember that there is a distinction between a company's management and its administration (e.g. keeping of the company's books and records and filing the requisite forms with the authorities). A company can be controlled and managed from the UK even if it is administered from outside the UK, or vice versa.

Essentially, the question here is, where are the fundamental decisions of the company taken? To be non-UK resident it can be enough that the directors sign relevant resolutions outside the UK (even on advice from UK advisors) so long as this act itself amounts to the free exercise of their discretion, and their role as directors has not effectively been usurped by some other UK resident person. Conversely, it is not enough to provide a paper trail if all that is happening is effectively a rubber-stamping exercise outside the UK.

Practical Advice

In order to ensure that the company is not UK resident for tax purposes, the following steps should be taken:

- All, or at least a majority, of the directors must be non-UK resident.
- All board meetings must be held outside the UK, with no directors attending by telephone from the UK.
- UK directors should not discuss board business in the UK in advance of the meeting.
- The non-UK resident directors must have the experience and expertise to be able to understand the company's business. They should be willing to come to the UK to give evidence in the event of litigation, following a challenge by HMRC.
- An agenda of the proposed business at the board meeting should be provided well in advance, together with a board paper giving full details of all the matters to be discussed, including relevant financial and other information and the reasons for and against the proposal, to enable the non-UK directors to participate fully in discussions and to make up their own minds; the paper should be produced in advance to enable the directors to ask (if they wish) for more information to be provided in time for the meeting.
- Board minutes should not be prepared in advance.
- Board meetings should not be held over lunch or in a hotel lobby.
- Discussions and decisions should be fully recorded and summarised in board minutes.

It is important that the actions of the offshore directors are not merely "rubber-stamping" business decisions but are discretionary decisions taken by the directors, based on the information provided.

If you would like to know more then please contact
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