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Offshore companies — Onshore management and control

18 NOVEMBER 2009

CATEGORY:
ARTICLE

Although this is only a first instance decision it nevertheless gives an interesting indication of the extent to which activities can be carried on in the UK without resulting in an offshore company becoming UK tax resident.Laerstate BV v HMRCThe risk of an offshore company being treated as resident in the UK is one faced by many family structures. Concern arises where there are directors or shareholders resident in the UK or, in relation to offshore fiduciary structures, UK beneficiaries who could be regarded as having too much influence.
These risks apply equally to businesses as well as family holding structures, investment vehicles and trust companies.

Management and control

If the central management and control of an offshore company is carried out in the UK, then the company itself – and any trusts of which it is sole trustee – will be UK tax resident. 'Management and control' refers to the highest decision-making level, and need not even involve the directors themselves if the directors usually follow the effective instructions of another person, or if their decisions are overseen in some other way that inhibits their freedom.
If there are directors, shareholders or beneficiaries in the UK, a key question is therefore whether they are seen to control the decision-making process from the UK, or whether the remaining or actual directors are able to make genuinely independent decisions and have the requisite skill 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 managed and controlled from the UK even if it is administered from outside the UK.
The essential question rather is where the fundamental decisions about the company are taken: it can be enough that the directors signed the 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 person. Conversely, it is not enough to provide a paper trail if all that is happening is effectively a rubber-stamping exercise.

Laerstate BV v HMRC

These questions were recently considered in the First Tier Tribunal in the case of Laerstate BV v HMRC. The case concerned a dispute about the UK tax-residence status of a Netherlands company. The tribunal concluded that the company was UK tax-resident because, although it apparently carried out certain high level managerial functions outside the UK, the company's management was, in reality, undertaken from the UK by its sole shareholder.

Background

The dispute concerned a Netherlands incorporated company owned by a single individual. It was not necessary for the tribunal to conclude that the owner was UK tax-resident but it seems to have been accepted that he was UK resident. The owner served for a while as a formal director of the taxpayer company alongside one other director but he later resigned, leaving the other director as the only formally appointed senior officer of the company.
The taxpayer company acquired a stake in a major UK company and later sold that stake at a profit. The UK tax authorities sought to tax the gain realised by the company, on the basis that it had been tax-resident in the UK during the relevant period by virtue of its central management and control having been exercised from the UK.

Activities carried out by the directors and shareholders

The company pointed to the significant number of formal managerial meetings that had been held in the Netherlands and various other locations outside the UK, many of which were not actually attended by the owner so that the company's other officer appeared to be acting alone. The Tribunal, however, refused to look simply at where resolutions had been signed. They looked at all the activities of the shareholder/director in the UK (including attending meetings with lawyers and other advisers).
The Tribunal considered whether the activities carried on both inside and outside the UK were concerned only with ministerial matters and matters of good housekeeping or with policy, strategic or management matters relating to the conduct of the business of the company. The Tribunal thought that the activities of the shareholder/director in the UK were related to the latter rather than the former and that these activities included decision-making in relation to the company's business.

Consideration of wishes of the shareholder

The Tribunal found that there is nothing to prevent a majority shareholder (whether a parent company or individual) from indicating how (in his or its view) the directors of the company should act. If the directors consider the shareholder's wishes and act on them it is still their decision. The borderline is between the directors making the decision and not making any decision at all.

The tribunal gave a scale of decision making on behalf of the directors:

- The extreme case being where an agreement is put in front of the directors open at the signature page and they sign it regardless.
- Moving up the scale is where the directors know what they are signing and sign it without considering whether it would be better to sign it or not. The question to consider here being whether the directors have the absolute minimum amount of information that a person would need in order to be able to make a decision at all on whether to agree to follow the shareholder's wishes or to decide not to sign.
- Next up the scale is the case where the directors follow the wishes of the shareholder after considering whether or not to follow them and have at least the absolute minimum information referred to above but less information than a reasonable director would require in order sensibly to decide whether or not to follow the shareholder's wishes. Here there is at least an absolute minimum of information and so there is a decision by the directors, although an ill-informed one (the Tribunal notes later on, however, that if the directors did follow the shareholder's wishes and did something inadvisable it would indicate that the decision was that of the shareholder and not the directors).
- At the other extreme is where the directors have sufficient information to make an informed decision.

What are the conclusions which can be drawn from this case?

- The Tribunal acknowledged that merely having a UK resident director (even if one of two) will not mean that the company is UK resident.
- The fact that the directors take account of the wishes of a UK resident shareholder will not mean that the company is UK resident provided that they have the minimum amount of information necessary to take a decision and actually take a decision whether or not to follow the shareholder's wishes.
- The directors should have enough information to enable them (on an objective test) to take a proper decision. If the decision taken is inadvisable or in breach of trust (but based on a request from the shareholder) then there is a suggestion in the case that they are more likely to be regarded as simply acting on the wishes of the shareholder.
- If any action is taken in the UK by a director (or a shareholder if the directors are not taking decisions appropriately) is concerned with the policy, strategic and management matters of the company and which constitutes the realistic positive management of the company then the effective management of the company is likely to be in the UK. It is important therefore to consider the nature of what is done both in the UK and outside the UK.

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