



Tax residency in Australia

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Outline of presentation

- ❖ Basis of taxation in Australia
- ❖ Corporate tax residency
- ❖ Central management and control
- ❖ *Bywater* decision
- ❖ Change of ATO view
- ❖ Implications for foreign corporates

Basis of taxation in Australia

- ❖ Sourced-based and residence-based taxation.
- ❖ Non-residents are taxed on Australian sourced income.
- ❖ Australian residents are taxed on worldwide income.

Corporate tax residency

❖ Three alternative tests.

❖ Place of incorporation test:

- company is incorporated in Australia.

❖ Residence of controlling shareholders test:

- company carries on business in Australia; **and**
- its voting power is controlled by shareholders who are residents of Australia.

❖ Place of management and control test:

- company carries on business in Australia; **and**
- has its central management and control in Australia.

Central management and control

- ❖ Different to the day to day conduct and management of activities and operations.
- ❖ Control and direction of the company's operations.
- ❖ Who are the people making high level decisions regarding:
 - the company's general policies;
 - direction of its operations; and
 - type of transactions?
- ❖ Where the board meetings take place?
- ❖ Ultimately a question of fact.

Bywater decision

- ❖ Four companies incorporated overseas.
- ❖ Companies were engaged in share trading on the Australian stock exchange. One company was also engaged in a money lending business.
- ❖ Directors and shareholders were all non-residents.
- ❖ Board meetings were held overseas. There was evidence of meeting minutes.
- ❖ Each company had a “controlling mind”, Mr Gould, an accountant based in Sydney, Australia. There was evidence that Mr Gould made all key decisions for each company.
- ❖ The directors were not involved in the decision making process. The directors merely acted at the direction of Mr Gould and “rubber stamped” Mr Gould’s decisions.

Bywater decision (cont.)

- ❖ Where the central management and control of a company is situated is a question of fact and degree.
- ❖ Central management and control is determined by reference to the course of business and trading of the company and not by reference to its constituent documents.
- ❖ There is no general principle or presumption that the central management and control of a company is taken to be located where the directors reside or where meetings of the directors take place. Confirms an earlier decision that was considered to stand for the proposition that the central management and control of a company is to be found where the board holds its meetings.
- ❖ The Court held that the holding of directors meetings overseas and the ownership structure of each company was a façade to conceal Mr Gould's role in the activities of each company.
- ❖ The Court held that the central management and control of the companies was in Sydney, Australia where Mr Gould made the substantive decisions.

Change of ATO view

- ❖ Following the *Bywater* decision, the ATO changed its view on when a company carries on a business in Australia and the operation of the place of management and control test.
- ❖ **Previous view:** A company that has major operational activities carries on business where those activities take place and not necessarily where its central management and control is located. A company that trades outside of Australia does not carry on a business in Australia, even if board meetings are held in Australia.
- ❖ **Current view:** A company that has its central management and control in Australia also carries on a business in Australia. The central management and control of a business is factually part of carrying on that business. It is not necessary for any part of the actual trading or investment operations of the company to take place in Australia.
- ❖ A company carrying on business does so both where its trading and investment activities take place, and where the central management and control of those activities occurs.
- ❖ Renders the place of management control test a single limb test rather than having two separate limbs.

Implications for foreign companies

- ❖ Foreign companies that do not operate in Australia may still be considered Australian tax residents.

- ❖ Foreign subsidiaries of an Australian parent company?
 - Same board of directors as Australian parent.
 - Different board of directors but takes instructions from Australian parent.
 - Evidence of board meetings and decisions are still important.

- ❖ Foreign company with Australian directors?
 - Where are the board meetings being held (in person vs electronically)?
 - Is there a managing director / veto power?

- ❖ Foreign company that takes advice from an Australian advisor?
 - Has the director's role been usurped by an outsider?
 - Influence vs decision making.

Implications for foreign companies (cont.)

- ❖ Company is also a resident of another jurisdiction?
 - Treaty countries – rely on tie-breaker rules.
 - Non-treaty countries – potential double taxation.

- ❖ Permanent establishment?



Questions?