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COMPANY RESIDENCE AND THE JERSEY TREATY

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An interesting point of construction arises in relation to one of the definition provisions in the UK/Jersey Double Tax Agreement 1952 (SI 1962/1216). The relevant provision is Article 2(1)(f) which provides as follows:

> "(f) The terms "resident of the United Kingdom" and "resident of Jersey" mean respectively any person who is resident in the United Kingdom for the purposes of United Kingdom tax and not resident in Jersey for the purposes of Jersey tax and any person who is resident in Jersey for the purposes of Jersey tax and not resident in the United Kingdom for the purposes of United Kingdom tax; and a company shall be regarded as resident in the United Kingdom if its business is managed and controlled in the United Kingdom and as resident in Jersey if its business is managed and controlled in Jersey."

In the remainder of this article I will refer to the part of (f) before the semi-colon as "the Body", and the part after the semi-colon as "the Proviso". This provision did not appear particularly controversial while the sole test for company residence in the UK (and in Jersey) was where the central management and control of the company's business was carried on. However, FA 1988 s.66 introduced a further rule which deems any company incorporated in the UK to be resident in the UK for tax purposes, regardless of where its business is centrally managed and controlled. This means that a UK incorporated company which is centrally managed and controlled in Jersey would be resident in the UK for UK tax

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purposes, and resident in Jersey for Jersey tax purposes. How would Article 2(1)(f) apply to such a company?

The Revenue's view is that the Proviso supplements, but does not displace, the Body. Thus, if a company is resident both in Jersey and the United Kingdom for the respective tax purposes of those two territories, it follows that it cannot be regarded as resident only in Jersey under Article 2(1)(f). Further, the Revenue say that the laws of the United Kingdom and Jersey respectively are to be applied (by reason of Article 2(3) of the Treaty) in deciding on residence, producing the conclusion that a company can be resident in the United Kingdom for the purposes of UK tax (for instance, because of FA 1988 s.66) and also resident in Jersey for the purposes of Jersey tax. In the Revenue's view such a person cannot be "a resident of Jersey" for the purposes of the Treaty.

Although the Body of (f), ignoring the Proviso, supports the Revenue's interpretation, it is at the very least a possible reading of (f) that the Proviso is intended to lay down for the purposes of (f) an exhaustive definition of residence applicable to companies. In other words, the Proviso displaces the provision in the Body that "a resident of the United Kingdom" means "a person who is resident in the United Kingdom for the purposes of United Kingdom tax". In effect, company residence is to be determined solely by the test laid down in the Proviso. Given that this reading is at least a possible one, the question is whether it should be preferred to the Revenue's interpretation, which is also a possible one.

Treaties are to be construed so far as possible to give effect to their purpose (*IRC v Commerzbank* [1990] STC 285 at pages 297, 298 and the cases and authorities there referred to). Further, in *Union Texas Petroleum Corporation v Critchley* [1988] STC 691, Mr. Justice Harman observed:

> "I consider that I should bear in mind that this Double Tax Agreement is an agreement. It is not a taxing statute, although it is an agreement about how taxes should be imposed. On that basis, in my judgment, this agreement should be construed as *ut res magis valeat quam pereat*, as should all agreements. The fact that the parties are "high contracting parties", to use an old description, does not change the way in which the Courts should approach the construction of any agreement."

The Latin extract in this quotation means "so that the thing has validity rather than perishes". Given that there is no plausible explanation for the existence of the Proviso, other than to provide an exhaustive definition of residence for companies, it must in my view be given that interpretation because otherwise it would "perish".

Article 2(3) of the Treaty does not support the Revenue's view. The reason for this is that the term "resident" in relation to a company is indeed defined in the Treaty by the proviso. Thus, we are not dealing with a term "not otherwise defined". That being so, Article 2(3) cannot have any application. Further, it should be accepted that domestic principles of residence are to be applied in construing the Body in any event. This does not, however, mean that domestic principles should not give way to the definition contained in the Proviso, where the Proviso produces a different result.

One point made by the Revenue is that the words in the Proviso are not enclosed in inverted commas. Hence, say the Revenue, they cannot be definitions. There is nothing in this point. The reason the word "company" in the proviso is not contained within inverted commas is that it has already been defined at Article 2(1)(e) immediately before (f). Nor is there anything in the Revenue's point that the Proviso is introduced by the word "and" rather than the word "but". There is no reason at all why a definition or interpretation provision should not be introduced by the word "and". Indeed, that word is appropriate. Had the phrase been "and for these purposes a company shall be regarded ..." the Revenue would surely have raised no such argument. Yet that is precisely the sense in which "and" should naturally be understood in the Proviso.

What the Revenue have failed to do is to suggest any plausible purpose for the Proviso if it is not to provide an exhaustive definition of the residence of a company for the purposes of the Treaty. On the Revenue's side it could be argued that the Proviso lays down a definition of residence which is different from the general-law definition which was applicable in Jersey and the United Kingdom when the Treaty was negotiated. However, in the author's view, any such argument would be wrong. The leading authority on the residence of a company was then, as it is now, the decision in *De Beers Consolidated Mines Limited v Howe* (1906) 5 TC 198 where, at pages 213 and 214, the Lord Chancellor made the following observations:

> "The decision of [other Judges in other cases] now 30 years ago, involved the principle that a Company resides, for purposes of income tax, where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule; and the real business is carried on where the central management and control actually abides ... this is a pure question of fact, to be determined, not according to the construction of this or that Regulation or by-law, but upon a scrutiny of the course of business and trading."

And later at page 214:

> "... the head and seat and directing power of the affairs of the Appellant Company were at the office in London, from whence the chief operations of the Company, both in the United Kingdom and elsewhere, were, in fact, controlled, managed and directed."

It would be a perfectly reasonable interpretation of this leading authority to regard it as laying down the rule that for UK tax purposes a company is resident where its business is managed and controlled. The fact that the word "centrally" does not appear in the Proviso governing "managed and controlled" cannot be taken as an indication that something other than the ordinary UK law meaning of residence of a company was to be implied. Clearer words would surely have been used had the draftsman intended to secure some different result, instead of hinting at a difference by omitting the word "central". Further, the phrase almost certainly bears the traditional *De Beers* meaning in the US/UK Treaty of 1975 (Article 4(1)(a)(ii)).

On behalf of the Revenue it might be asked, if the proviso does no more than to lay down in the Treaty itself the rules for determining residence which applied in the UK and Jersey anyway, what was the purpose of repeating those rules in the Treaty? Thus, the Revenue could say, even the taxpayer's argument leads to the same redundancy as does the Revenue's. In the author's view, this argument too would be ill-founded. It is not unusual to find that a statutory provision or contract makes clear that which might otherwise be the subject of debate. Tax Treaties are a kind of agreement which become statutory in force. Thus the negotiators might well have wished to make clear that which might otherwise have been argued to be unclear.

The Revenue might also contend that it is an odd construction of the Treaty that it lays down a special rule for determining the residence of corporations, while leaving individuals to be governed by the domestic laws of respectively the United Kingdom and Jersey. However, this is not really particularly odd. The residence of individuals raises more difficult questions of fact and degree than that of companies. It would have been much more complicated to deal with individuals' residence in the Treaty. In any case, the fact that the residence by companies had been specifically dealt with is clear. There is no "proviso" for individuals. Thus, whatever the reason for this, the Proviso makes special provision for companies and not for individuals, and so the task must be to ascertain the meaning of the special rules for companies rather than to speculate about what might have been the thinking behind making no parallel such provisions for individuals.

The possibility of arguing that the Proviso is a "tie-break" provision is one which has also been considered. It is true that the author's construction of Article 2(1)(f)

leads the Proviso to operate as a tie-breaker in certain circumstances. One must also recognise that its equivalent plays that role in the Malaysian and Singapore Treaties (see Article 2(1)(g)(iii) of the 1966 Singapore Treaty and Article III(B) of the 1973 Malaysian Treaty). However, it is better not to describe it in that way. Rather, it is preferable to describe the Proviso as laying down exhaustively a means of determining the residence of a company for the purposes of the Treaty, or at least the Body. This is preferable because there will be cases where the company might be managed in both territories, the United Kingdom and Jersey. For example, board meetings might alternate between those two territories. In such circumstances, the Proviso would not operate as a tie-break, because it would not break the tie.

This is clearly a difficult and controversial point of treaty construction. Further views would be most welcome!