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ON

RESIDENCE FOR TAX PURPOSES IN NEW ZEALAND

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RESIDENCE

INTRODUCTION

The concept of residence is one of the foundation stones of our taxation system, for it is one of the two bases upon which taxation is assessed in this country.[1] Yet despite its importance, it remains a vague and uncertain concept, having been neglected because its legal significance becomes evident only in isolated cases.

Thus, most taxpayers permanently reside, live and work within one tax jurisdiction, and no question arises as to the country in which they are resident. However, in an age where supranational corporations are spreading their web of influence and control and where the individual is becoming increasingly mobile, moving between taxing jurisdictions for the purposes of his work and his pleasure, this area of the law is beginning to assume greater importance.

It is therefore regrettable that, in New Zealand, our statutory provisions have received little judicial consideration, and one is therefore compelled to look abroad for assistance in their interpretation and construction. Although the approach in England has in some respects differed from our own, the guiding principles of residence become

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1. First, a person is taxed on all moneys derived from a source within New Zealand, irrespective of his place of residence; secondly, a person who is resident in this country is taxed on all moneys derived from whatever source, see s.165 Land & Income Tax Act 1954.

apparent from a consideration of the common law decisions, and elucidate the nature and scope of our own statutory provisions.

It is necessary, however, to divide any discussion of residence between that of theindividual, and that of the corporation[2], since the factors relevant to each do not coincide. Prior to this divided treatment, some brief words should first be said about the broad conception of residence.

DOMICILE AND RESIDENCE

"Residence" has not been comprehensively defined for tax purposes in England or, arguably, in this country.[3] In its application by the English Courts[4], it bears a resemblance to physical presence in a country, yet goes further than this. Physical presence only becomes residence after a continued presence in a taxing jurisdiction, or

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2. This division is itself insufficient, since it will be necessary also to consider the position with regard to an entity whose separate existence is not recognised in our law, the trust, which will be briefly considered later in the paper.

3. The position in New Zealand is dependent on the relationship between sections 165 and 166 Land & Income Tax Act 1954; the writer's view, which will be considered at a later stage, is that section 166 does in fact embody a comprehensive definition of residence.

4. These comments on the broad nature of residence as conceived and applied by the Courts in England relate to the residence of the individual; however, corporate residence has been developed by analogy from the conception of individual residence, it having been with individual residence that the Courts were originally concerned. The rationale behind the Courts' attribution of residence to individuals is consequently most apparent in the case of individuals, and must be critically transposed against corporate existence in order to evaluate the Courts' past willingness to develop corporate residence by such analogy.

alternatively after prior physical presence results in the taxpayer's physical presence in a particular tax year possessing a particular quality that constitutes it residence for tax purposes.[5]

Some idea as to the source or derivation of that quality is suggested in the Report of the Canadian Royal Commission on Taxation,[6] by whom it was said:

> "... residence seems to imply a closer association than citizenship between the taxpayer and the use of services provided by a taxing jurisdiction."

Continued presence is but one ingredient of the quality of a taxpayer's physical presence, and this quality itself appears to be governed by the relationship which a taxpayer has to the taxing jurisdiction in which he is physically present, and by the reciprocal responsibility that arises from this relationship.

The United States Courts[7] have interpreted this relationship on the basis of domicile, the place where a taxpayer has his permanent home and in which he intends to

5. Originally, residence was thought to be the equivalent of sustained physical presence, but this conception has gradually been modified, as will shortly be seen from the English decisions, which evidence the introduction of additional factors as determinants of residence.

6. Report of the Royal Commission on Taxation (Ottawa: Queen's Printer, 1966) Vol. 4 p.541.

7. See World Tax Series "Taxation in the United States" Harvard Law School at p.1086.

remain;[8] in the Australian legislation, "domicile" is expressly made a major determinant of residence.[9]

However, it is clear that residence is neither mere physical presence on the one hand, nor domicile on the other. It is an intermediate status in which the nature of one's physical presence, the "quality" of such presence, is significant. Whereas domicile is measured largely by intention, residence is measured by presence in a country of such a nature that an association is thereby established with that country.

This association is of a temporal or material nature based not on one's desires and intentions so much as on one's actual enjoyment of the benefits and services of a society.

The major problem encountered with residence is the need to distinguish between mere transient physical presence, such as that of a tourist, and the more sustained presence of an individual which establishes this relationship between an individual and the country in which he is physically present, the consequence of which is that he is taxed not only on income derived by him from sources in that tax jurisdiction but on income derived from whatever source wherever situate.

It is important, in examining residence as applied

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8. For discussion of domicile for tax purposes, see Vol. E of Simon's Taxes.

9. See section 6 Income Tax and Social Services Contribution Assessment Act 1936. Domicile is not however itself the test, as will subsequently be seen.

by the English Courts and as embodied in our statutory provisions, to remember the consequences of residential status and the function that such status is intended to fulfil.

It is the writer's view that the English Courts and our legislators have neglected this substantive aspect of residence, and have instead developed tests of residence in isolation from the overall perspective of the taxation statute. This is particularly apparent with corporate residence, which has been developed by analogy with individual residence but without any appraisal of the substantive differences between the two types of entity and the probable inappropriateness therefore of such an analogy. It is however also apparent with individual residence, which the English Courts have haphazardly developed according to the factual situation confronting them.

This absence of overall direction and purpose will be considered further towards the end of the paper, when our provisions have been examined and understood. The immediate need is to understand the nature and scope of residence as it presently exists.

PART 1: RESIDENCE OF THE INDIVIDUAL

PRELIMINARY

Although the statutory provisions in the Land & Income Tax Act 1954[10] relating to the residence of the individual have adopted a different approach from the English common law, the problems that have arisen for consideration apply equally to both jurisdictions. In this fact lies the assistance that can be derived from the decisions of the English common law, and indeed from the decisions of the Australian Courts.[11]

ENGLISH COMMON LAW

Physical presence in a tax jurisdiction has generally[12] been regarded by the Courts as an essential consideration in the determination of residence, and sustained physical presence as conclusive of the same. The

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10. Sections 165 and 166. The earlier provision talks only of residence with no guidance as to its meaning, such guidance being provided by section 166 which deems a person to be resident in New Zealand if his home is in this country. The relationship of the two sections becomes important to determine whether section 166 provides an exhaustive definition of residence in lieu of the common law, a question that will be considered at a later stage in this paper.

11. The Australian provision, section 6 Income Tax and Social Services Contribution Assessment Act 1936 retains the common law tests of residence as additional to the criteria specified in that provision.

12. The cases of seamen abroad during the entire income year are an exception to this rule, which exception will shortly be considered.

possession of a permanent establishment or home has come to be equated with such sustained physical presence, and the mere possession of such irrespective of the period of the individual's presence in it in the income year in question, has become sufficient to establish residence.[13] The Courts have here imputed sustained physical presence on the basis of such possession of a permanent home or establishment.

THE POSSESSION OF A PERMANENT HOME

What constitutes a "permanent residence"[14] such as to permit the law to ascribe or impute residence in this way?

In Lloyd v. Sulley (supra), it was said of "residences" that:

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13. Thus, in Lloyd v. Sulley (1884) 11 R (Ct of Sess.) 687; 2 T.C. 37, it was said that the length of the stay in an abode was immaterial provided its occupation had the ordinary characteristics of a settled residence or home. However, residence does not exist if the alleged taxpayer does not visit his permanent establishment or home during the income year in question; thus, in Iveagh v. Revenue Commissioners [1930] I.R. 386, the taxpayer had an establishment in the United Kingdom, and had in previous years visited it annually, but in the particular income year no visit was paid by the taxpayer to his establishment, and he was therefore held not to be resident in the United Kingdom. See also Pickles v. Foulsham [1923] 2 K.B. 413 (on appeal [1925] A.C. 458) and Turnbull v. Foster (1911-15) 6 T.C. 206. In this latter case, the individual in question resided in Spain, but in previous years he had with his family visited a residence in England owned by his wife; in the tax year, no visit was paid, and he was held therefore not to be resident in England in that income year. However, Lord Moncrieff considered that the fact of absence throughout the income year was itself inconclusive, since if he had been travelling during this period or had been a mariner, his absence would not have prohibited his having a residence in that country. This view contrasts with the other two decisions on this point, which suggested that continued absence throughout the income year excluded the possibility of residence.

14. The terms "establishment", "home" and "residence" are frequently used interchangeably in this context.

> "they are places to which it is quite easy for the person to resort to as his dwelling place whenever he thinks fit, and to set himself down there with his family and establishment."[15]

The application of this test of residence has resulted in the English Courts regarding the annual renting of a shooting box in Scotland for two months by an American as an establishment such as to constitute residence,[16] and the occasional use of a shooting box owned by a company by its Belgian director as sufficient to constitute him a resident of England.[17]

These decisions illustrate the way in which the English Courts have extended the early concept of a "permanent establishment" to embrace an establishment of a very transitory and temporary nature, totally unrelated to sustained physical presence.[18]

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15. 2 T.C. 37 at page 41. Lord President.

16. Inland Revenue Commissioners v. Cadwalader (1904) 5 T.C.101. It is to be noted that in this case emphasis was for the first time placed on visits to a country in pursuance of regular habits of life in conjunction with the maintenance of an establishment.

17. Loewenstein v. de Salis (1926) 10 T.C. 424. It was held not to be necessary to have a proprietary interest in the residence; it was necessary to look to the substance of the matter, and in this case the taxpayer was able to come over to England at any time; his actual position was as good as ownership.

18. A further extension is evidenced in an Australian Board of Review decision, 1 C.T.B.R. (N.S.) 136, where the Chairman said that a person with a residence or dwellinghouse in the United Kingdom is resident there even if his stay there is for a short period only, and it would not matter whether his place of residence was owned or merely rented by him, or by his wife, or (if unmarried) by his parents. cf. C.I.R. v. Derry (1927-28) 13 T.C. 30 where annual visits were paid to England by the appellant, but because the house was purchased by the wife for her own residence, he was not held to be resident in England even though in the event his wife did not use it as a home, and during his visit, the appellant did reside there for a time in the income year in question.

In the same way that they have imputed residence to an individual in such circumstances of short term presence, so also have they imputed the residence of a sailor to the country in which his family resides.

Indeed, in Rogers v. Inland Revenue (1879) 1 T.C. 225, the Lord President went further and said at p.226:

> "Every sailor has a residence on land. Where is this man's residence? The answer undoubtedly is that his residence is in Great Britain. He has no other residence, and a man must have a residence somewhere."

However, this broad statement has been qualified by subsequent Australian decisions,[19] and the true rule is submitted to be that a sailor is generally deemed to reside where his wife and family have their home,[20] irrespective of whether the taxpayer visits such a home during a particular income year.[21] He is not deemed to reside in a country if he

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19. See 15 C.T.B.R. 52.

20. This was first enunciated in Re. Young (1875) 1 T.C. 57, where a master mariner maintained a house in the United Kingdom, where his wife and family dwelt, and was regarded as a resident in that country, even though he was in the country for only a small part of the year of charge.

21. This was the effect of Rogers v. Inland Revenue (supra), the facts of which were similar to Re Young (supra) except that the taxpayer was abroad for the whole of the year of charge. But contrast decision in 1 C.T.B.R. (N.S.) 36 where the individual in question joined vessels travelling throughout the world, with no guarantee of return to Australia, where he left his wife. He left Australia in the knowledge that he would be absent for an indefinite period, and in the event he was absent for twenty-six months. Although his wife was residing in Australia, the Board of Review rejected the argument that he was resident where his wife resided on the basis that the sailor could be resident on his vessel, distinguishing Rogers v. I.R. (supra) as having been decided on the basis that a sailor could not reside on his vessel, which subsequent cases had proved to be wrong.

has no wife or family or dependants whose home might be regarded as his own. In this situation, he is likely to be regarded as resident upon the vessel on which he serves;[22] in the situation where he has a wife and family residing on land, he may be regarded as resident there as well as on his vessel.[23]

It was argued in one Australian decision[24] that, where a seaman was resident upon a seagoing vessel, he was resident in the country where that vessel was registered. It was not necessary for the Board of Review to determine the point, but the Chairman cited the judgment of Lord Lindley in Chartered Mercantile Bank of England v. Netherlands India Steam Navigation Company (1883) 10 Q.B.D. 521 at p.544 where he said in connection with the view that a vessel is subject to the law of the country of its registration:

"This reason is based on a very common and fruitful source of error, viz. the error of

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22. In 15 C.T.B.R. 52, the taxpayer went on board his vessel with all his personal effects, with the intention of boarding on the ship, and with no intention of returning to Australia. He had no wife or children or other dependants. The broad statement of the Lord President in Rogers v. Inland Revenue (supra) was distinguished on the basis that the taxpayer's wife and family resided in England. This was not here the case, and his permanent place of abode in terms of the Australian Act was held to be on board the vessel. It had been made clear in Brown v. Burt (1911) 5 T.C. 667 that a boat could constitute a place of residence, as it had been in C. of T. v. Miller [1944-47] 73 C.L.R. 93, and these cases were followed.

23. In 10 C.T.B.R. 102, the taxpayer was held to be resident both upon his vessel as well as upon land in the country where his wife and family resided.

24. 15 C.T.B.R. 56.

identifying ships with portions of the territory of the States to which they belong. The analogy is imperfect and is more often misleading than the reverse."

It is submitted that this principle has no application in taxation law, since the registration of a vessel in a certain country in no real sense creates an association between the seaman and that state; he does not thereby enjoy its benefits and services.[25]

It is evident from the seaman cases that physical presence over a sustained period in a country is not necessary to create residence.[26] The short length of one's stay will in itself tend to negative residence, but may be counterbalanced in whole or in part by other factors, the first one seized upon by the Courts being the possession of a family home or permanent establishment. The existence of such is deemed in law to create that relationship with a country which sustained physical presence would otherwise evidence.

PERSONS WITH NO PERMANENT HOME IN THE UNITED KINGDOM

The isolation of further factors beyond the possession of a permanent home or establishment was precipitated by a number of cases where the taxpayer had no permanent establishment in England or elsewhere, but who

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25. In 10 C.T.B.R. 102, reference was made to a statement of Dicey that persons might be homeless because their lives are spent at sea, and this possibility would seem to exist.

26. Although sustained presence would itself probably be sufficient to found residence, depending on the length of time of such presence.

nevertheless spent a significant amount of time in England.

In these circumstances, the English Courts examined the "connections"[27] which the taxpayer had had with the United Kingdom in the past and if, combined with his or her regular visits, they evidenced a close affinity to the United Kingdom, the Courts held the taxpayer to be resident in the United Kingdom although no permanent home was possessed and even though no great length of time was spent in England.

These cases illustrate that the Courts are concerned not so much with the mere presence of a person

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27. Thus, in Reid v. I.R.C. [1926] 10 T.C. 673 the appellant was a British subject and lived in hotels in England and abroad, where she spent the greater part of the year; apart from nationality, her connection with England was that her effects were stored in London where her bank account was kept. Unlike the Lord President, Lord Blackburn based his judgment not on the regularity of her visits, but on the fact that she had resided in England during the preceding year, and in the year in question had ceased to so reside in a permanent establishment, but had nevertheless spent three and a half months in England, thereby suggesting that her residence had not been terminated. In Levene v. I.R.C. [1927] 2 K.B. 38; [1928] A.C. 217, the appellant was a British subject who lived in London until 1919, at which time he left England under medical advice with the intention of living abroad. He returned to England for a period of about five months in each year until 1925 for the purpose of obtaining medical advice, visiting his relatives, taking part in certain Jewish religious observances, and dealing with his income tax affairs. He had no fixed residence either in the United Kingdom or abroad during this period, and he was consequently held to be resident in the United Kingdom during this period. Viscount Carr, in reaching this conclusion, had regard to the appellant's past and present habits and life, the regularity and length of his visits, and in particular his freedom from attachments abroad and his ties with England. In both these cases, the Court looked to the nature of the individual's relationship with England as against any possible relationship with other countries abroad and, coupled with the regularity of his or her visits, held the individual to be resident in England. The approach of the Courts is explained by Mr. Justice Noel in E.L. Schujahn v. Minister of National Revenue [1962] Can. T.C. 364, where he said the status in such circumstances is acquired by "a consideration of the connection by reason of birth, marriage or previous long association with one place."

as establishing residence so much as with the nature or quality of such presence.

Thus, in Reid v. I.R.C. (supra), the Lord President said:[28]

> "The facts of the relation between a person's life and the place in which part of it is spent may contain elements of quality, connected with the person's mode of life, and so on, which are equally relevant for consideration."

The Courts first isolated the possession of a permanent establishment or home as evidencing such a quality but, confronted with a set of facts where no permanent establishment or home was possessed, they were compelled to look further into the essence of residence and at the qualities of physical presence which constituted the same. As a consequence, they now look to a diverse set of factors which determine the nature or quality of a person's presence; in so doing, residence comes to bear a resemblance to domicile.

Yet it appears to be something less than domicile, for physical presence for some part of the income year is a prerequisite to the consideration of such other factors.[29] That it is something short of domicile is apparent from those cases where a person has a permanent home or establishment abroad but who, by virtue of his regular visits to England, is nevertheless held to be resident in England.

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28. [1926] 10 T.C. 673 at p.679.

29. Save in the exceptional case of seamen.

OCCASIONAL REGULAR VISITS BY PERSON WITH HOME ABROAD

In I.R.C. v. Lysaght [1928] A.C. 234, the taxpayer lived in Ireland but attended monthly board meetings in England. In this case, Viscount Sumner said:[30]

> "It does not follow that keeping up an establishment abroad and none here is incompatible with being 'resident here', if there is other sufficient evidence of it. One thinks of a man's settled and usual place of abode as his residence, but the truth is that in many cases in ordinary speech one residence at a time is the underlying assumption and, though a man may be an occupier of two houses, he is thought of as only resident in the one he lives in at the time in question. For income tax purposes such meanings are misleading. Residence here may be multiple and manifold."

The House of Lords in this decision decisively abandoned any confined conception of residence in terms of a "fixed place of abode" or "establishment", and said that residence indicated a quality of the person going beyond mere physical presence or the possession of such an establishment.

Thus, Viscount Sumner also stated:[31]

> "grammatically the word 'resident' indicates a quality of the person charged and is not

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30. ibid. p.244

31. ibid. p.244

descriptive of his property, real or personal."

The regularity of the taxpayer's visits to England, coupled with his commercial involvement there, persuaded the Court that the taxpayer's presence was more than merely transitory.[32]

In two earlier decisions, the individuals in question regularly spent a few months of each year in the United Kingdom, but were held not to be residents, but

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32. Contrast the Australian decision of F.C. of T. v. Robertson /1936/ 57 C.L.R. 146, where a taxpayer was on a trip to Europe and England for both business and pleasure, and was held not to be a resident, despite his commercial involvement in England. It was said:

> "He clearly went to England as a visitor. His settled home was in Australia and he was away from it only for the purpose of obtaining the advantages of travelling abroad. The advantages included the gathering of information for use in his company's business and meeting people personally with whom the company desired to enter into negotiation, as well as pleasure, relaxation and the enjoyment of the interests which other countries present. There was no purpose the fulfilment of which would require his presence in England for an unknown or indefinite duration of time. He did not take a flat or house there. Returning to the same hotel and leaving heavy luggage there shows little except that such a course appeared convenient at the moment. The use of a London office of an Australian bank as a postal address appears to me to have no significance."

The presence of two further factors, his own repeated return to England and the education of his children there were not, with those factors just mentioned, sufficient to establish some "connection" between the taxpayer and England.

travellers only.[33] In another decision, the individual spent an apprenticeship of three years in the United States (having before this been resident in the United Kingdom) yet in the course of this period he spent a lot of time in the United Kingdom on business; he was nevertheless held to be resident in the United States.[34] Similarly, an actress having a permanent abode in the United Kingdom in the form of a flat but in the income year in question having the majority of her professional engagements in the United States was held to be not resident in the United Kingdom although she spent short periods of time there during the year.[35]

These cases illustrate the difficult balancing of

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33. In C.I.R. v. Zorab (1926-27) 11 T.C. 289, the respondent lived in India, but on his retirement travelled, and while in England in the course of such travels stayed in hotels. He had no business interests in England, and the purpose of his visit was solely to see friends. Reid v. I.R.C. (supra) was distinguished on the basis that in that case the taxpayer had some connection with England, whereas the respondent was here a "mere traveller". The decision of C.I.R. v. Brown (1926-27) 11 T.C. 289 was more like Reid v. I.R.C. (supra) for the respondent had originally lived in England, served in India, and then retired to England for twenty-five years. He then stored his furniture and travelled, spending three months of each year in hotels in England. Despite the fact that his furniture was stored in England, his banking account was in England, and he had connections with England, he was held not to be resident there In an Australian decision of the Board of Review, 1 C.T.B.R. (N.S.) 136, the Chairman stated that a person could be a resident if he stays in hotels or the houses of friends provided his visits to the country are not paid merely in the course of travel, but form part of his habits of life or business and are sufficiently frequent and prolonged.

34. I.R.C. v. Combe (1928-33) 17 T.C. 405. Lord Sands said that had the respondent's presence in England in the first year of his apprenticeship (3 months) been as long as his presence in the two succeeding years (5½ and 6 months), he might have held otherwise.

35. Withers v. Wynyard (1938) 21 T.C. 724.

considerations which the Courts are required to resolve, with the consequence that these decisions lack consistency. The difference between a director's regular attendances of board meetings and an actress's less regular visits coupled however with periods of employment and residence in her own abode appears very slight, and the writer considers the latter decision is inconsistent with the other decisions of the Courts relating to residence.

Despite this unsatisfactory aspect, it is evident that the Courts have employed a different test in this situation, that of regular visits to the country which, coupled with the nature of such visits, may lead the Courts to hold there to be residence.

The practice of the Board of Inland Revenue in England is that a person is resident in England if he visits England year after year so that his visits become in effect part of his habit of life and the annual visits are for a substantial period or periods of time.[36] The Board regards an average annual period of three months as "substantial" and the visits as having become "habitual" after four years.

It is noticeable that while domicile is here not the determinant of residence, since the possession of a permanent home abroad suggests that domicile will be in that country,[37] nevertheless the Courts continue to have regard to

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36. See "Simons' Taxes" Vol. E at p.765. See also Robertson v. F.C. of T. [1936] 57 C.L.R. 146 in which Mr. Justice Dixon makes explicit reference to the English Department's practice.

37. e.g. in I.R.C. v. Lysaght (supra) where the taxpayer's domicile was clearly in Ireland where he lived. cf I.R.C. v. Combe (supra) where the individual's domicile of choice was England, which his three year temporary absence would not alter.

the nature and quality of the individual's presence. In so doing, they have been compelled, though reluctantly, to look to the intention and purpose of the individual in order to evaluate the nature and quality of his presence.

How is this interest of the Courts in intention to be distinguished from domicile on the one hand, and on the other from the oft stated principle that residence is a question of fact?

THE RELEVANCE OF INTENTION

The question of the voluntariness of an individual's presence was first considered in I.R.C. v. Lysaght (supra), where it was argued that the taxpayer's presence was forced upon him by business considerations and not by his choice, and that for this reason he could not be said to be resident in England.

Lord Buckmaster said at page 248:

> "A man might be compelled to reside here completely against his will ... and though a man may make his home elsewhere and stay in this country only because business compels him, yet nonetheless, if the periods for which he stays are such that they may be regarded as constituting residence, it is open to the Commissioners to find that in fact he

does so reside"

The rejection of voluntariness and intention was repeated in Inchiquin v. I.R.C. (1948) 31 T.C. 125, and has been adopted in the Australian Courts on a number of occasions.[38] In one of these,[39] it was said:

"But freedom of choice of residence and intention to take up residence are matters which concern domicile as distinguished from residence in fact."

Nevertheless, it is clear that the Courts in both England and Australia have at times scrutinised the intentions of the taxpayer in order to determine his residence.[40] Certainly they have sought to avoid reference to intention,[41]

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38. 1 C.T.B.R. (N.S.) 29; 10 C.T.B.R. 104; 11 C.T.B.R. 78; and 15 C.T.B.R. 57. cf. New Zealand of Slater v. Commissioner of Taxes /1949/ N.Z.L.R. 679 in which the taxpayer served overseas on war duties, and for a length of time was a prisoner of war, yet was held to be "ordinarily resident" in New Zealand in terms of section 17 Finance Act 1940 on the basis that his family home was in New Zealand during his absence. A similar approach was suggested by Mr. Justice Dixon in C. of T. v. Miller (supra) where he suggested that as the base in Papua was a military base, he would have held the taxpayer to be resident in Australia (where his wife resided) and not in Papua as decided by the lower Court; however, he did not upset the lower Court's judgment.

39. 11 C.T.B.R. 78.

40. Indeed, section 51(1) Taxes Act 1970 (U.K.) specifically refers to a person who is in the United Kingdom for a temporary purpose only as not being there resident provided certain additional criteria are satisfied.

41. Thus, it is only in a few cases that specific reference is made to the purpose or object of the person's presence e.g. C.I.R. v. Brown (supra) and C.I.R. v. Zorab (supra)

yet in their consideration of the nature of a person's physical presence they necessarily consider the purpose of his presence, from which purpose they are able to measure the nature of his association with the country in which he is physically present.

It is in this respect that intention becomes relevant. Whereas the intention relevant to domicile is the intention to permanently reside in a place, the intention relevant to residence relates to the purposes of one's presence, which purposes address themselves not to the intended length of one's physical presence so much as to the reasons for one's actual presence, for whatever length of time that may involve.

RESIDENCE A QUESTION OF FACT

Although the approach of the Courts appears to have been at times haphazard and inconsistent, it is submitted that this is due at least in part to the significant influence that a Court of first instance has. As the determination of residence has been seen as being a question of fact, appellate Courts have shown a marked reluctance to upset the decisions of lower Courts.

In I.R.C. v. Lysaght (supra), Lord Buckmaster said:[42]

> "The word 'reside' in the Income Tax Acts is used in its common sense and it is essentially a question of fact whether a man does or does not come within its meaning ... the matter must be a matter of degree, and the determination of

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42. [1928] A.C. 234 at page 247.

whether or not the degree extends so far as to make a man resident here is for the Commissioners and it is not for the Courts to say whether they would have reached the same conclusion."

The only instance where an appellate Court is willing to upset the decision of the lower Court is where there was no evidence upon which the lower Court could have reached its decision.[43]

It was suggested in one Australian decision[44] that an appellate Court is not so restricted as this, since a question of law is involved even though all the material facts are fully found and the only question remaining is whether those facts are such as to bring the case within the provisions properly construed of some statutory enactment.

It is submitted that the broader view of the Chief Justice is to be preferred; while residence is usually described as a question of fact, it is submitted that the isolation of those factors which are in law determinative of residence is a question of law, or at least of mixed fact and law. In ascertaining the nature or quality of a person's physical presence, one is not concerned merely to balance different relevant factors; one is also concerned at the isolation of those factors which are indeed relevant.

Yet in the same way that the writer has experienced difficulty in isolating factors determinative of residence

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43. See I.R.C. v. Lysaght (supra)

44. See the dissenting judgment of the Chief Justice in C. of T. v. Miller (supra)

so also have the Courts. In practice, they do not isolate factors but make a broad analysis of the nature or quality of an individual's presence based on the combined effect of all the factors present, an exercise which the Court of first instance is better equipped to perform.

As a consequence, appellate Courts have always been unwilling to upset a judgment of a lower Court, and even if one accepts that a question of law is involved, the practical consequence is unlikely to be very different.

RECAPITULATION

It is possible from the cases to list the types of considerations to which the Courts have had regard, even though they seldom if ever isolate them in this fashion.

They can be summarised as follows:

(i) the individual's past residence history and way of life,

(ii) his physical presence in the United Kingdom during a particular year of assessment,

(iii) the maintenance of a place of abode in the United Kingdom, available for his use,

(iv) the purpose of his visits to the United Kingdom and of his visits abroad,

(v) the habitual nature (or otherwise) of his visits to the United Kingdom,

(vi) the substantial (or otherwise) nature of his visits to the United Kingdom.

Residence does not require the existence of all or any particular combination of the above;[45] but in isolation or with one another they may be sufficient to establish a person's relationship with a country in such a way that he is regarded as resident for tax purposes.

The primary lesson apparent from the English common law is that residence requires neither a continuous physical presence nor the possession of a permanent establishment, but instead a form of association with a country such that one's physical presence in that country takes on the character of residence even if the length of such physical presence be short.

It is not possible to provide a more comprehensive definition of residence than this. As was said by Mr. Justice Noel in E. L. Schujahn v. Minister of National Revenue (supra).[46]

> "The gradation of degrees of time, object, intention, continuity and other relevant circumstances shows that in common parlance 'residing' is not a term of invariable elements, all of which must be satisfied in each instance. It is quite impossible to give it a precise and inclusive definition."

THE NEW ZEALAND POSITION

With the benefit of the conception of residence

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45. Except in most cases for the inclusion of (ii).

46. A Canadian case in which the residence of the appellant was in issue, and in which the English common law was referred to.

embodied in the English common law, it now becomes appropriate to examine our own statutory provisions, which are set out below:

"Section 165. Liability for assessment of income derived from New Zealand and abroad - (1) Subject to the provisions of this Act, all income derived by any person who is resident in New Zealand at the time when he derives that income shall be assessable for income tax, whether it is derived from New Zealand or from elsewhere.

(2) Subject to the provisions of this Act, all income derived from New Zealand shall be assessable for income tax, whether the person deriving that income is resident in New Zealand or elsewhere.

(3) Subject to the provisions of this Act, no income which is neither derived from New Zealand nor derived by a person then resident in New Zealand shall be assessable for income tax.

Section 166. Place of residence, how determined - (1) A person other than a company shall be deemed to be resident in New Zealand within the meaning of this Part of this Act if his home is in New Zealand."

It can be seen that section 165 employs the term "resident" without prior definition, and its construction is dependent upon its common law meaning, unless it takes its meaning from the succeeding section.

The relationship of these two sections is therefore

important to the nature of residence in this country, but has been considered judicially only once.

In In re M (1945) 4 M.C.D. 341, before Mr. Luxford S.M., it was argued that the taxpayer had no home in this country and was therefore not resident in this country even though he had lived here in excess of twelve months in board and lodgings (as distinct from a permanent establishment or home).

The Magistrate rejected this argument, and applied the common law test of continuous physical presence for a sustained period. He considered that the then equivalent of section 166(1) was supplementary and additional to the equivalent of section 165, and was enacted to gather in a class of persons which would otherwise have escaped the embrace of section 165.

That class of persons comprised such persons as received income from overseas sources who, when abroad and absent from New Zealand, would at common law have ceased to be resident in this country, with the result that income derived from overseas sources would cease to be taxable in this country.

However, it is not clear that the adoption of the term "home" in section 166(1) does in fact cover this situation, for if a taxpayer went abroad for a period in excess of one year, it is possible that the Courts would be unwilling to regard his home as still being in this country.[47]

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47. To do so would be in conflict with the decisions in Iveagh v. I.R.C. (supra) and Turnbull v. Foster (supra); however, it is the writer's view that the Courts would do so despite this conflict, as will shortly be considered.

Irrespective of this, there are a number of reasons which suggest that the Magistrate's interpretation of the relationship of the two sections is incorrect.

The criteria set out in section 166 forthe determination of residence[48] relate not only to individual residence, but also to corporate residence, and are intended to be definitive of both. Even if the criterion specified for the determination of individual residence could be said to contemplate a specific contingency, it cannot be said that the criteria set out to cover corporate residence are intended for contingent situations only, since they appear as a comprehensive substitution for and modification of the common law tests of corporate residence.

This view of section 166 as providing an exhaustive definition of residence is supported by the Supplementary Report of Taxation in New Zealand,[49] and is consistent with the fact that the primary criterion of residence laid down in the United Kingdom-New Zealand Double Tax Agreement is the same.[50]

It is submitted that the comments made by the Chief Justice in Commissioner of Taxes v. Johnson & Maeder [1946] N.Z.L.R. 459 give further support to this view, for in that case he contemplated the criteria laid down in the section as determinative of residence; there was no suggestion by him

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48. Section 166 is described "Place of Residence how Determined", but it is submitted that this is a marginal note such that section 5(g) of the Acts Interpretation Act 1924 excludes its consideration for purposes of interpretation.

49. see Supplementary Report of Taxation Review Committee (New Zealand) February 1968.

50. see Double Taxation Relief (United Kingdom) Order 1966

that there might be further criteria based on the common law.

Finally, it is submitted that the words of section 166 lead to the conclusion that it is definitive, for a person is in terms of the provision "deemed" to be a resident of this country in the circumstances prescribed. The term "deemed" is synonomous with the term "adjudged",[51] and is intended to embody an exhaustive definition of the term "resident".

It was said in St. Aubyn (L.M.) v. A.G. (No. 2) [1951] 2 All E.R. 473 at page 498 of the term "deemed":

> "Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain, and what is, in the ordinary sense, impossible."

It is submitted that in section 166 the term is aimed at giving a comprehensive description of residence so as to remove the uncertainty evident in the common law. Its use in our section can be sharply contrasted with its employment in Australia, where the phrase used is "deemed to include", which clearly illustrates that the criteria specified are not intended to be exhaustive, but as supplemental to the common law meaning of residence.

It is noteworthy also that in the English decision of Earl Cowley v. I.R.C. [1899] A.C. 198, upon which Mr. Luxford S.M. placed great reliance, the term used in the statutory

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51. See St. Leon Village Consol. School District No. 1425 v. Roncevay (1960) 31 W.W.R. 385, 391.

provision in question was also "deemed to include", and was similarly described as supplemental to the preceding provision.[52]

It is therefore submitted that the learned Magistrate's decision was wrong, and would not be followed by a superior Court in this country. Section 166 is intended to provide an exhaustive definition of residence for the purposes of our Act; it is now therefore important to examine the scope and nature of the new criteria of individual residence provided in that section.

THE MEANING OF "HOME"

The term "home" is not completely new, since it has been used on occasions in the English common law decisions[53] in the sense of a physical dwelling.

In Todd v. McNicoll [1957] A.S.R. 72, it was said at page 86:

> "A home is a place where the residents ordinarily eat morning and night, and where they usually sleep. With adults it may have the characteristics of permanency. A home is, or used to be, regarded as a place of refuge and rest."

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52. That decision can also be distinguished on the basis that the deeming provision sought to bring within the law's embrace a situation otherwise clearly excluded; that could not have been the case with the phrase "home" which embodies much of the common law but in certain respects goes beyond it.

53. e.g. Lloyd v. Sulley (supra); I.R.C. v. Lysaght (supra) (Lord Buckmaster); and Pickles v. Foulsham (supra) (Mr. Justice Rowlatt). The terms used do however vary between "an establishment", "a house", and "a residence" in addition to "a home".

In an earlier New Zealand decision, Slater v. Commissioner of Taxes [1949] N.Z.L.R. 679, "home" was equated with a family place of residence.

Mr. Justice Northcroft said:[54]

> "His home had always been here. When he was on active service, his family continued to maintain a family home in New Zealand. He had no residence elsewhere."

The question of the meaning of "home" was extensively considered in a subsequent New Zealand decision, W. v. Inland Revenue Commissioner 8 A.I.T.R. 289 in which case the taxpayer was present in New Zealand for a period of four years in connection with the construction of the Auckland Harbour Bridge, residing during this time first as a boarder and then as a tenant. The question arose as to whether he had a home in New Zealand.[55]

Mr. Coates S.M. referred to the earlier decisions mentioned above,[56] and at page 293 said:

> "A home must be regarded as a place to which the characteristics of stability and permanence are

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54. [1949] N.Z.L.R. 679 at p.683. In this case, the taxpayer served overseas on war duties, and was for a length of time a prisoner of war.

55. This question arose in the context of whether the taxpayer was an "absentee" within the scope of section 76 Land & Income Tax Act 1954, which defines an absentee as a person whose home has not been in New Zealand during any part of the income year.

56. He referred also to the interpretation of section 166 given by Mr. Luxford S.M. in In re M (supra), but found it unnecessary to determine the relationship of the two sections.

attached. It is one's fixed or settled abode and the place where one's roots or permanent attachments are to be found."

and

"A home according to common usage is the fixed residence of a family or household or the dwelling which one habitually lives in."

These statements give strong support to a narrow construction of the term "home", equating it with a physical dwelling having certain characteristics. Such a construction would be much narrower than the English conception of residence, which started with a similarly narrow conception of a permanent establishment, but gradually developed to embrace persons with no fixed abode in this country but who by the nature of their presence are nevertheless held to be resident.

It would also be narrower than the Australian interpretation of the term "a place of abode" which it appears may be construed more broadly than to mean merely a physical dwelling.[57] At the very least the Australian legislation recognises residence in circumstances which a narrow

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57. In 10 C.T.B.R. (N.S.) 44, the Board approved the meaning of "place of abode" given in 15 C.T.B.R. 56 to the effect that it might mean a person's "home or dwellinghouse or other habitation or the village, town, city, district, county, country or other part of the world in which a person has his home or dwellinghouse or other habitation or in which he habitually resides." The elements of continuity and permanence appear to take precedence over a fixed structure; however, the Australian Courts have trodden carefully, and in 15 C.T.B.R. 56 they were not willing to regard a sailor's residence as being on the vessels on which he served because he frequently changed vessels. See however the dissenting judgment of Mr. O'Neill in that case.

construction of "home" in New Zealand would exclude. Thus, a person from abroad regularly visiting our country, and a person such as Miss Reid having no permanent establishment in any country but regularly visiting this country and having close ties with it would not be resident in New Zealand in terms of our Act, but could come within the terms of the Australian provision.

It is submitted that the employment of the phrase "his home" as distinct from "a home" in our provision may facilitate a broader construction of the term so as to extend beyond a physical dwelling and include a person who resides within New Zealand, though in no fixed abode,[58] and who can therefore be said to have his or her home in New Zealand.

However, whichever construction is given to the phrase, its nature and scope remains to be considered, and in particular the degree to which it approaches domicile as a test of residence.

It appears that, even given a broad construction, our provision does not emcompass a person having an establishment abroad but none in this country, the regularity of whose visits to this country render them a habit of his life. In terms of our provision, a person can have only one home, which in this situation would be in the country where his permanent establishment was situated.

In the event of a person having establishments or

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58. Whether it be a wandering tramp or a person such as Miss Reid regularly visiting this country.

homes in two countries, in both of which he spent similar amounts of time, it is submitted that here a Court would be compelled to evaluate the nature and quality of the individual's presence in each, and to attribute residence in the sense of the location of his home to that country with which he possessed the closest association.[59]

However, the major area of uncertainty with regard to the phrase "his home" arises where a person having a home in New Zealand is absent abroad for an extended period.

The common law decisions made it clear that the mere possession of a permanent establishment or home would be insufficient to constitute residence if the taxpayer is physically absent during the whole of the income year in question.[60]

In contrast to these decisions, Mr. Justice Northcroft in Slater v. Commissioner of Taxes (supra) considered that a person continued to be ordinarily resident in New Zealand when he served overseas on war duties while his family home was maintained in this country.

> "He had no residence elsewhere. He was otherwise no more than a sojourner from time to time and from place to place, according to the exigencies of his service. His detention as a prisoner-of-war involved the longest periods of continued presence in any one place, but, even then, it

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59. This contrasts with the common law, where in such a situation dual residence would be recognised.

60. See Turnbull v. Foster (supra), Iveagh v. I.R.C. (supra)

> cannot be said, according to the common usage of the words, that he was either 'continuously resident' or even 'resident' at all in the prisoner of war camps."

This decision is in direct conflict with the English common law decisions, it being clear from those decisions not only that prolonged absence terminated residence but also that the voluntariness or otherwise of one's presence in a particular place was irrelevant.[61] While this case can be distinguished as involving the construction of a different statute, the interpretation given was clearly intended as a modification of the common law principles and cannot therefore be ignored.

Furthermore, the decision in W. v. Inland Revenue Commissioners (supra) supports the view of Mr. Justice Northcroft, for Mr. Coates S.M. considered that the taxpayer's home was in England even though he worked in New Zealand continuously for four years.

The approach in these two cases is closely akin to a test based on domicile, and a test resembling domicile appears to be implicit in the terminology of our own provision. The term "his home" excludes the existence of a place of comparable status elsewhere, and suggests that the absence of a taxpayer abroad will not affect the status of "his home" in this country, unless he establishes "his home" in another country, thereby resembling the position with domicile.

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61. See 10 C.T.B.R. (N.S.) 44 and 15 C.T.B.R. 56

Thus, if in his absence he maintains a family home in this country, his country of residence would continue to be New Zealand. However, if he took his family with him and set up house abroad then, irrespective of the intended length of his stay abroad, he would for the purposes of the Act have established his home abroad; although his country of domicile continues to be New Zealand, his country of residence for tax purposes ceases to be New Zealand.

In this sense our provision embodies an emasculated test of domicile, emasculated in the sense that it resembles but falls short of domicile.

The approach adopted by our Courts is likely to follow the guideline of the Australian statutory provision, which has as one of its criteria of residence the provision that a person domiciled in Australia is deemed to be resident there unless he has a permanent place of abode abroad; a "permanent place of abode" does not mean a home in another country such as to constitute domicile in that country, but instead means an abode outside Australia having the character of permanence.

Thus, if a taxpayer's absence from this country is sustained for a period in excess of twelve months, it is probable that he will continue to be regarded as resident in this country unless his presence in a particular place abroad takes on the character of continuity and permanence.

Thus, if a person spends a number of years abroad travelling, the Courts would consider "his home" to be in New Zealand during this period. If however he took a job for a

period in excess of six months, it becomes probable that the Courts would regard "his home" as having ceased to be in this country; it is submitted however that they would closely examine the nature of his presence in a particular country, least he shortly thereafter resume his travels, in which event they would be faced with the difficulty of imputing residence to this country even though in the previous income year he had just terminated such residence.

These comments indicate the uncertainty introduced into our law by the adoption of a phrase the meaning of which is unclear, both in the statutory provision itself and in the common law. Its adoption may however avoid one difficulty apparent in Australia, namely whether residential status necessarily entails assessment to income tax for the entire year of assessment.

RESIDENCE FOR ALL OR PART OF INCOME YEAR

In the English common law, residential status results in the taxpayer being assessable in respect of the whole income year,[62] whereas in Australia a taxpayer is generally assessed only in respect of that period of the income year during which he is resident.[63] The exception to this general position is where a person is held to be resident on

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62. See Elmhurst v. C.I.R. 21 T.C. 381 where the appellant and his wife spent approximately 8½ months in England, at no time during this period intending to set up residence there. Despite this, they were held to be resident during the entire income year. A discussion of the English provisions is contained in 1 C.T.B.R. (N.S.) 136.

63. See 1 C.T.B.R. (N.S.) 136

the basis of his presence for a part only of the income year.[64]

Where a person's residence is based upon his possession of a permanent home, coupled with his intention to reside in such a home for an extended period,[65] then the Australian Courts will assess his liability to tax from the moment of commencement of such residence, and not for the entire income year.

It is submitted that the Courts in New Zealand would also adopt this approach, at least insofar as the possession of a permanent establishment is envisaged by the phrase "his home". In such a situation, the divisibility of residence between countries is possible; thus, if a person sets up house in this country, and has retained no house abroad, then his residential status would be held to have commenced on the date of his arrival in this country.[66]

However, where difficulties might be encountered in New Zealand is where a broad construction is given to the phrase "his home" so as not to be restricted to a physical

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64. See subsection (ii) of the Australian definition of residence whereby a person is deemed to be resident in Australia if he spends in excess of six months in Australia, he has no usual place of abode outside Australia, and he has no intention of setting up residence in Australia, it being necessary for a person to satisfy the Commissioner on these last two points. Since the English common law still applies in Australia, it would seem that residence in circumstances of presence during a part only of the income year which is not covered by the statutory criteria would also result in assessment for the entire income year.

65. In such circumstances, he will either be domiciled in Australia, or alternatively his lack of a home elsewhere will render his residence in Australia beyond doubt.

66. Even if a permanent establishment was only obtained at some subsequent date, it is submitted that the element of continuity and permanence that emerges over a period retrospectively colours the early period of a person's residence.

dwelling. However, such a broad construction would only encompass a person such as Miss Reid who has no other home abroad, and in respect of whom it is therefore reasonable to regard her home as being in this country for the whole of the income year. In such a situation, her residential status in this country only continues while she possesses no permanent establishment abroad and, in this event, it is probable that a division would be made in the particular income year.

It is therefore submitted that in New Zealand residential status may relate to all or only part of the income year, depending on the circumstances of such residence. The exclusive nature of residence in this country avoids the uncertainty which exists in Australia on this point.

PART II CORPORATE RESIDENCE

PRELIMINARY

In the same way that the statutory provision in this country dealing with individual residence is more completely understood by reference to the common law, so also with corporate residence it is helpful to examine the common law from which our statutory provision is modelled.[67]

DETERMINATION OF CORPORATE RESIDENCE

The basic tenet behind the means adopted of determining individual residence is that an individual resides where he eats, sleeps and keeps house, a conception inapplicable to the artificial personality of a company. Nevertheless, the English Courts have sought to apply this conception of residence by analogy to the company.

Thus, in de Beers Consolidated Mines Ltd. v. Howe (Surveyor of Taxes) [1906] A.C. 455, Lord Loreburne said:[68]

> "In applying the conception of residence to a company, we ought to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it

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67. The question as to whether common law principles still apply in addition to the criteria laid down in section 166 Land & Income Tax Act 1954 has already been considered, and the conclusion that common law principles do not still apply except as embodied in our provision.

68. [1906] A.C. 455 at page 458.

really keeps house and does business."

It has been from this statement that the test of corporate residence has been developed, the test being the place of the company's central management and control.[69]

The difficulty in this area is not so much the enunciation of the test of corporate residence so much as its application. The person whose residence is in question has no mind or body, and there may be an accumulation of conflicting factors which militate towards alternative locations of the central management and control of a company.

THE ROLE OF DIRECTORS

However, although the company has no brain itself, it possesses the equivalent of such an organ in the collective decision-making functions and powers of its board of directors, whose actions and ideas are collectively those of the company.

In San Paulo (Brazilian) Railway Company Ltd. v. Carter (1890-1898) 3 T.C. 407 Lord Watson said:

> "But the substantial fact remains that the directors, subject to any resolutions which may be passed for their guidance by members of the company, are vested with the sole right to manage and control every department of its affairs."[70]

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69. It is not intended here to trace the development of this principle, which has not been disputed by the Courts.

70. 3 T.C. 407 at page 412.

and

> "The only persons who can with propriety be described as carrying on the trade of the company are its directors, who for all purposes of administration and management are the company itself."[71]

It is evident from the decisions in this area that the place where the directors exercise their powers has been the primary determinant of residence and that the difficulties for the Courts have arisen where there exist two boards in different countries both exercising powers of management and control, or alternatively where there exists one board only, but which board exercises its powers in different locations and countries.

The Courts have accordingly been called upon to isolate those particular powers of management and control whose exercise in a particular place constitute that location the place of the company's central management and control.

THE DIVISION OF MANAGEMENT AND CONTROL

The Courts have pursued this inquiry in two ways.

In the first place, they look to the place where the more formalised aspects of a company's management and control[72] are exercised, such as:

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71. ibid. page 412.

72. No distinction is here drawn between management and control, since the Courts have at no stage expressly recognised such a distinction. The effect of such a distinction will be considered at a later point.

(a) the place where shareholders' meetings are held,

(b) the place where dividends are declared,

(c) the place where the profits of the company are applied,

(d) the place where appointments of directors are made,

(e) the place of remuneration of directors,

(f) the place where the company's accounts are kept,

(g) the place where the seal, the minute book, the register of members, and the records of the company are kept,

(h) the place where control of the share capital is exercised,

(i) the place where transfers of shares are executed.

However, it is submitted that these factors are incidental to the main inquiry of the Courts which is as to the place where the overall management and control of the company's affairs takes place.

OVERALL MANAGEMENT AND CONTROL IS PRIMARY DETERMINANT

This was the essence of the approach pursued in de Beers Consolidated Mines Ltd. v. Howe (Surveyor of Taxes) (supra), where the question was as to where real control of the company was vested.[73] It was there held to be vested with the London Board, which negotiated the contracts of the company with the diamond syndicates, determined company policy respecting the disposal of diamonds and other assets, the

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73. The company, involved in diamond operations in South Africa, had one Board, whose members resided in both South Africa and Britain, the majority being in Britain. Directors' meetings were held in both countries.

working and development of the mines, and the application of the company's profits, and appointed the directors of the company. In other words, it possessed the powers of overall management of the company's affairs.

A similar approach is seen in New Zealand Shipping Company Ltd. v. Thew 8 T.C. 208[74] where overall management and control was seen to rest with the London Board of Directors.

It was argued in that case that the company's operations in the different countries should be regarded as independent, and that residence should be in both countries to the extent of the localised operations, but this contention was rejected, since the New Zealand operations were seen as part of the company's overall operations, as distinct from the situation where the local operations in both countries were of a different nature.[75]

This question of the independence of parts of the company arose also in Egyptian Hotels Ltd. v. Mitchell 6 T.C. 542, where the local Egyptian board of directors was

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74. This case involved two boards located in Britain and New Zealand. The London board conducted all the financial and administrative business of the company, and generally decided all questions of policy; the New Zealand board conducted the company's business in Australasia, subject to the powers of the London board just mentioned. Ordinary meetings were held in both countries, while extraordinary meetings were held only in London. See also American Thread Company v. Joyce (1911-15) 6 T.C.1

75. It was also significant that the localised operations in both countries were clearly interrelated by virtue of the shipping line controlled by the English board upon which the localised operations depended.

wholly independent of the English board.[76] The majority disregarded the fact that the local operations of the company in Egypt were run independently, and considered that the general financial arrangements of the Egyptian company were dealt with and controlled by the English board.

Lord Parker voiced a strong dissent on the basis that the parent board's actions in the particular tax year were short of taking any part in or exercising any control over the carrying on of the business in Egypt,[77] and criticised the majority for concerning itself with potential as distinct from actual management and control.

The case resembles the decisions in de Beers Consolidated Mines Ltd. v. Howe (Surveyor of Taxes) (supra) and New Zealand Shipping Company Ltd. v. Thew (supra), and embodies the same approach of the Courts in looking for the place of overall management and direction of the company's affairs, as distinct from the place of local trading operations.[78] That the Court is not concerned with the place

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76. The extent of the English board's influence was that it was able to direct the manner of utilisation of the Egyptian company's profits, it controlled the company's share capital, and the remuneration of the Egyptian board, and it managed the affairs of the rest of the company, considered the company's accounts, declared dividends and authorised loans to the Egyptian company.

77. In the tax year in question, the English board merely authorised the borrowing of £10,000 to pay a dividend, reported the Egyptian company's results for incorporation into the accounts, and declared a dividend.

78. Yet the criticism of Lord Parker appears to be deserved, with the majority misconstruing potential for actual overall management and control. The implications of the dissenting viewpoint if accepted will be considered shortly.

of (localised) trading operations is clear from the decisions in San Paulo (Brazilian) Railway Company Ltd. v. Carter (supra)[79] and KoitakiPara Rubber Estates Ltd. v. Commissioner of Taxes 2 A.I.T.R. 167.[80]

In this latter decision of the High Court of Australia, Rich, A.C.J. said at page 169:

> "Sydney is the pivot or axis on which the operations of the company hinge. There matters of policy and finance are determined and all the direction, control and management take place. There it has its life and being. In Papua, the company's operations fall into an auxiliary or subordinate position of a purely local, as opposed to a central, nature."

In two more recent Australian decisions, however, the place of trading operations has assumed greater significance, and has correspondingly suggested a diminution in the importance of the place where directors meet as the determinant of corporate residence.

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79. An English company was formed for the purpose of making and working a railway in Brazil. The company was resident in England, and the business was carried on under the control and direction of directors in England. The accounts were kept in London, where all meetings were held and dividends declared. The directors appointed a superintendant who resided in Brazil. He was a salaried officer of the directors, removable at their pleasure, and bound to obey and execute their orders. Although the practical day-to-day administration of the project was in his hands, overall direction and control was vested in the directors.

80. The company was incorporated in Australia but owned rubber plantations in Papua. The plantations were managed by an officer of the company who had full responsibility insofar as they were concerned. However, it was held that his responsibility did not extend to the general affairs of the company, such control being centred in Sydney.

PLACE OF TRADING OPERATIONS

Both decisions involved pastoral companies which operated properties in the Northern Territory, but whose directors met in other states.

In North Australian Pastoral Company Ltd. v. F.C. of T. 3 A.I.T.R. 315, it was held that the company was a resident of the State in which its farm property was located,[81] since the station manager was considered to take the initial responsibility in all things most affecting the success of the company's undertaking. The Court considered it to be significant that the directors sometimes visited the property, and that decisions of policy were arrived at in conjunction with the station manager.

Mr. Justice Dixon said:[82]

> "The company's enterprise was not a financial or trading business the control and management of which might be considered to depend on decisions of policy and upon the judgment and capacity of the general manager independently of the locality. It was essentially localised."

The Court was careful to avoid the attribution of residence based on the individual having the greatest

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81. This was a decision in which it was not disputed that the company was resident in the State where its directors met; the question at issue was whether the company could be said to be resident in the Northern Territory, which perhaps explains some of the Court's willingness to depart from the approach of the Courts in earlier cases.

82. 3 A.I.T.R. 315 at p.322.

influence on the company's affairs,[83] and the case is most easily reconciled with earlier decisions as one involving dual residence where a portion of the superior controlling authority of the company was exercised on the property.[84]

In Waterloo Pastoral Company Ltd. v. F.C. of T. 3 A.I.T.R., 329,[85] the Court went further, and the case is not so easily reconciled with existing authorities. One of the directors made regular and frequent visits to the company's stations and exercised general supervision over the work carried on there under the immediate and continuous supervision of the manager.

Mr. Justice Williams said that two of the directors had actual effective management and control of the pastoral business of the company, and that the minutes of board meetings showed that the only business transacted there related to formal matters of company routine.

> "It is clear that a pastoral company in the Northern Territory can only be effectively carried on by experienced pastoralists who either lived on the property or regularly visited it to see the condition of the country and stock for themselves."[86]

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83. The relevance of an individual's influence will shortly be considered.

84. This test was first enunciated in Koitaki Para Rubber Estates Ltd. v. C. of T. (supra) and was approved in this case; it was developed to replace the test of central management and control in cases of dual residence, a question dealt with subsequently.

85. The company was incorporated in the Northern Territory, and its seal, register of members and minute book were kept there. However, the directors resided in Sydney, with infrequent directors' meetings being held at both localities.

86. 3 A.I.T.R. 329 at p.331.

He considered that the decisions of the directors in Sydney were tentative only, it being necessary for one of the directors to visit the stations before it could be determined whether the decisions should be given effect to or should be modified due to local conditions. Thus, the ultimate operative decisions were made on the stations themselves.

The case is, like its predecessor, explicable on the basis that a portion of the superior controlling authority was exercised in the Northern Territory, and indeed there was more evidence in this case to support such a finding. Yet the Court appeared unconcerned at associating the company's residence with the dominating influence of particular directors. It is therefore necessary to examine to what extent the Courts are permitted to examine the influence of a particular individual in a company as a measure of that company's place of residence.

Prior to this examination, however, the effect of these decisions must be considered. Is the place of overall management and control to be disregarded in the case of certain types of enterprise, and the place of trading operations looked to instead, even though the directors do not meet there?

The implication of the judgments in these two cases is that by their nature, such enterprises require no overall direction and management, and that the place of trading operations is the important feature of such a company's affairs. The two decisions can be reconciled on the basis that directors' meetings were sometimes held on the

properties, but it is not difficult to envisage the situation where the board never does this, but leaves the day-to-day management of the company's undertaking to a manager on the spot.

In such a situation, the board retains overall control, but its actual management in a particular year may be non-existent; its management and control takes on the colour of potential rather than actual management and control, in the same way as was seen in Egyptian Hotels Ltd. v. Carter (supra).

In what sense therefore is the Court required to look only at actual, not potential, management and control?

ACTUAL, NOT POTENTIAL MANAGEMENT AND CONTROL

It was argued in Waterloo Pastoral Company Ltd. v. F.C. of T (supra) that the directors had powers under the articles of association to require that all important decisions should be subject to its confirmation, and that it could have met more regularly to exercise the control instead of leaving these decisions to two directors.

Mr. Justice Williams, echoing Lord Parker's dissent in Egyptian Hotels Ltd. v. Carter (supra), rejected this contention on the basis that the Courts were concerned with the place of real control, not the place of potential control.

This view is clearly supported by the most recent decision in this area of the law, Unit Construction Company Ltd.

v. Bullock [1959] 3 All E.R. 831.[87]

Yet the majority decision of the House of Lords in Egyptian Hotels Ltd. v.Carter (supra) suggests that the Courts may be unwilling to disregard the possession of overall powers of control; in that case, the powers of management were exercised by the Egyptian board, without interference by the English board,[88] and on this basis Lord Parker in his dissent considered the company to be resident in Egypt.

The powers of management and control were vested in the English board, but were not used in such a way as to affect the local operations of the Egyptian company, yet the majority nevertheless considered the company to be resident in England.[89] Their decision can best be explained on the basis that while the powers of management vested in the English board were not exercised by them, the powers of control were in continuous existence and by virtue of such existence were in

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87. In that case the boards of certain subsidiaries to a parent company never took any decisions as a board and were never summoned to meet as such; the real central control and management of the company was in the hands of the parent company, even though this was contrary to the constitution of the subsidiary companies, and the Court held that the parent company in England exercised the same, and therefore determined the residence of the subsidiaries as being in England.

88. See note 77.

89. Lord Parmoor, in the majority judgment, stated that it was within the power of the directors in England to say in what manner the available assets of the company should be allocated, and if the Egyptian business carried on at a loss in any particular year, the responsibility rested with them for making the necessary financial arrangements; the Commissioners had found that the directors were empowered to and did deal with the general affairs of the company, including all general financial arrangements of the company.

constant use, albeit in a negative sense only.

According to this view,"control" embodies continuity and actuality, and is utilised in every situation where a person has control. His nonintervention does not deny the present existence of such control; it means only that people become aware of his control only when he finds it necessary to intervene with the actions of those over whom he has control.

If control is so regarded as a continuing state, the question arises as to the way in which the Courts are to measure the relative strengths of management on the one hand and control on the other; however, the Courts have never drawn a distinction between the two, and have never been faced with this problem.

This continuing nature of control may in some measure account for the approach of the majority in Egyptian Hotels Ltd. v. Carter (supra), but the Courts have tended to look only at the exercise of managerial powers in their consideration of residence. As a consequence, no clear answer is given by the authorities to the position in a case where a Board of Directors of a pastoral company never meets on the company's properties.

The Australian decisions suggested that by the nature of such enterprises, management and control could not be exercised anywhere but on the property itself, and the decision in Unit Construction Company Ltd. v. Bullock (supra) recognises that a board of directors might not exercise any of its powers, in which case the Courts must therefore look to another person or body exercising such

powers. The combined effect of these decisions might entitle a Court to hold the company to be resident at the place of its trading operations. However, it is submitted that the Courts will be loathe to disregard that body of persons to whom the company vests the powers of management and control. The nature of such reluctance becomes clearer when one looks at the restricted powers of the Courts to investigate the source of influence within a corporate structure.

INDIVIDUAL INFLUENCE

In John Hood & Co. Ltd. v. Magee (1918) I.T.C. 327 a company was effectively controlled by one person, Mr. Hood.[90] Mr. Justice Gibson said in this case:

> "The residence of the company cannot be determined by Mr. Hoods choice of his own residence. No doubt wherever he went, he carried his functions with him. He might have gone for health to Davos or Colorado for two years and equally controlled the business from his new home, either personally or through managers in New York, and the agents appointed by him. All the same, he was not the company, it owned his brain and capacity as well as the business. The tap-root of the fruit-bearing tree was at Belfast."

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90. The company was registered in Ireland, and had its office in Belfast. General meetings of the few shareholders were held there and Mr. Hood visited Belfast to conduct the formal and official proceedings of the company. He was sole director of the company, and in terms of the articles he exercised exclusive and supreme control of the company, although as a shareholder he did not possess a majority of the votes attaching to the shares.

This case illustrates that the Courts are not concerned to ascertain the source of influence and control in the company, since to do so would deny the existence of the company as a separate entity. This approach has been reinforced by a number of other decisions where the Courts have been requested to ignore corporate entity but have refused to do so.

In Kodak Ltd. v. Clarke [1903] 1 K.B. 505, an English company carrying on business in the United Kingdom owned 98% of the shares in a foreign company, which gave it a preponderating influence in the control of the company, the election of its officers, and in other facets of the company. The remaining shares were held by independent persons, and there was no evidence that the English company had ever attempted to control or interfere with the management of the foreign company, or had any power to do so otherwise than by voting as a shareholder.

Lord Justice Vaughan Williams held that the foreign company was not carried on by the English company; whatever amount of control the English company might have, it was the control of shareholders only, not the control of masters or principals.

A similar approach was adopted by the Court in The Gramophone & Typewriter Ltd. v. Stanley [1908] 2 K.B. 89,[91] where the Master of the Rolls considered that although an individual or his nominees might control practically all the

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91. The English company carrying on business in the United Kingdom in this case held all the shares in the German company.

shares in a company which would enable him by exercising his voting power to remove the directors and in this way enforce his own views as to policy, nevertheless this in no way diminished the rights or powers of the directors, or made the property or assets of the company his, as distinct from the corporation's.

He went on to say:[92]

> "Nor does it make any difference if he acquires not practically the whole, but absolutely the whole, of the shares. The business of the company does not thereby become his business. He is still entitled to receive dividends on his shares but no more."

The Master of the Rolls recognised however that a person in such a position could cause such an arrangement to be made that the company would for taxing purposes become his agent.

This unwillingness to ignore the corporate structure is seen again in C.I.R. v. Sansom [1921] 2 K.B. 492 where the main shareholder held all but one of the company's shares.

Lord Justice Scrutton said:[93]

> "Speaking for myself, ... once you get an independent shareholder in the secondary company it is impossible to say that the business of the secondary company is the business of the man who owns most or nearly all of the shares in that company. The profits do not

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92. [1908] 2 K.B. 89 at page 96.

93. [1921] 2 K.B. 92 at page 509.

belong to the man who holds most of the shares; they belong to the shareholders through the company."

He tacitly agreed with the Master of the Rolls in The Gramophone & Typewriter Ltd. v. Stanley (supra) that there might be circumstances and arrangements which would make a business carried on by a company the business of an individual, in which case the company would be the individual's agent.[94]

The preferable view seems to be that the number of shares held should not be the measure of control, but the nature in which the potential for control is exercised is the decisive question, there being no control by virtue of the substantial shareholding alone.[95]

This is illustrated by a decision in direct contrast with C.I.R. v. Sansom (supra), namely Malayan Shipping Company Ltd. v. F.C. of T. 3 A.I.T.R. 258 where an individual resident in Australia had effective control over a company incorporated in Singapore, of which he was managing director and for which two nominees were resident directors in Sangapore. All decision-making took place in Australia, for the managing director made decisions, and arranged for his nominee directors to rubber-stamp transactions where necessary.

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94. However, in this case, the lower Court had found the loan transactions in question to be genuine, which negated the principal/agent relationship.

95. This apparently conflicts with the construction placed on the term "control" by the writer in reference to the decision in Egyptian Hotels Ltd. v. Carter (supra) at page 49 hereof. However, there appears to be room for saying there is a difference of degree rather than substance between the two situations; whereas in the Egyptian Hotels Ltd. v. Carter (supra) the parent board took a continuing interest in the affairs of the local Egyptian Board, in these cases the major shareholders took few if any steps to influence the management of the company.

In this case, he effectively controlled the affairs of the company, and thereby managed and directed its affairs. It resembles the position in a series of cases involving American brewing companies effectively controlled by British companies, which American companies were kept on foot only to comply with United States requirements.[96] In each of these cases, the American companies were held to be resident in England, despite the existence of nominal committees of management in the United States, since effective overall management and control was exercised from England.

In The Gramophone & Typewriter Ltd. v. Stanley (supra), these brewing cases were distinguished on the basis that the American directors were delegates of the English company, and the English company had the entire right of control and the entire directing power over the affairs of the American company.

It therefore seems that the Courts are reluctant to disregard the corporate entity and its associate structure, but will do so if it appears that the normal decision-making machinery has ceased to function independently of the dictates of another person or body, or alternatively has ceased to function at all.

In the case of the pastoral companies, if the board of directors never met, or met only to keep alive the corporate machinery and to distribute the proceeds from the company's undertaking, it is submitted that the Courts would be willing to hold residence to be at the place of the company's operations in the former case, but in the latter case, would be reluctant to disregard the board of directors, who have a continuing control even if it is not made obvious by regular

96. The Frank Jones Brewing Coy. Ltd. v. Apthorpe 4 T.C. 6; United States Brewing Coy. Ltd. v. Apthorpe 4 T.C. 17; Apthorpe v. Peter Schoenhofer Brewery Coy. Ltd. 4 T.C. 41.

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DUAL RESIDENCE

The test developed by the Courts as the determinant of corporate residence is, as has already been seen, the place where central management and control are located. In view of the difficulties that arise in isolating those elements of management and control which constitute the place of their location the place of central management and control, it is not surprising that the question should have arisen whether such central management and control can be divided.

The Courts have held in a number of instances that it can be divided,[97] but in the originating decision, Swedish Central Railway Company Ltd. v. Thompson /1925/ A.C. 495, Lord Atkinson expressed a strong dissent.

> "There cannot be, it would appear to me, two systems of central management and control of one entire business situated in two distinct and separated places. Then if it only be a fragment of the real business of the company which need be carried on in each residence, one may ask in a void how is that fragment to be ascertained? It appears to me to involve a contradiction in terms."[98]

In order to avoid the logical inconsistency of this test, the High Court of Australia has developed an alternative

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97. See Swedish Central Railway Coy. Ltd. v. Thompson /1925/ A.C. 495 and Egyptian Delta Land & Investment Coy. Ltd. v. Todd /1929/ A.C. 1.

98. /1925/ A.C. 495 at page 512.

test which encompasses dual residence. Residence is held to arise in any country in which to a substantial degree acts of controlling power and authority are exercised.[99]

This development was ushered into English law in the decision in Union Corporation Ltd. v. I.R.C. (supra), and was referred to by Lord Radcliffe in Unit Construction Company Ltd. v. Bullock (supra).

It represents a realistic development, having regard to the practical difficulty of isolating those elements of a company's business which constitute its real seat of management and control. Yet the same questions remain as to what are acts of controlling power and authority; it merely makes the Court's job easier in the event of the division of these activities after they have been identified.

CONCLUSION

As was seen with individual residence, the law has developed a means of determining corporate residence without assessing the rationale behind such residence. It appears never to have been considered whether a company should have dual residence; this concept has instead been used as a means of attributing residence in one's own tax jurisdiction where it is clear that the company is already resident elsewhere.

Since individual residence has not been equated with domicile, but is based largely on one's physical presence in such circumstances that the law considers there to be an

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99. See Koitaki Para Rubber Estates Ltd. v. C. of T. 2 A.I.T.R. 136.

association between that country and oneself, so it seems reasonable that a company may have dual residence, based on its divided "presence".

It becomes difficult in this situation to comprehend why a company is not resident where it trades, since one would expect an association to arise from this. However, the mere derivation of income in the case of an individual does not establish residence, and similarly for a company there is no reason why it should do so.

But that being the case, if we are to look to the real place of business, then one should look for one place only, for it appears logically inconsistent to say that the real business of the company is conducted in two places. The difficulty this highlights in discovering the rationale behind corporate residence accentuates the need for clear statutory guidelines.

This need has, to some extent at least, been fulfilled in our statutory provisions in this country.

CORPORATE RESIDENCE IN NEW ZEALAND

The determination of corporate residence in this country is governed by section 166 of the Land & Income Tax Act 1954, which provides as follows:

"(2) subject to subsection (2) of section 148 of this Act (which relates to banking companies), a company shall be deemed to be resident in New Zealand within the meaning of this Part of this Act if it -

(a) Is incorporated in New Zealand; or

(b) Has its head office in New Zealand.

(3) For the purposes of this Act, the head office of a company means the centre of its administrative management."

The appearance of incorporation as a conclusive measure of corporate residence requires no explanation, although the justification for its introduction can be questioned. The incorporation of a company in a particular country bears little reference to the location of its management or of its operations, and while it does mean that the company will be governed by the laws of that country, this is true only insofar as its activities occur in the country of incorporation.

Incorporation is similar to the birth of an individual, and just as the latter does not determine residence, it is surprising that the former should in our law do so. The rationale for its inclusion appears to have been the practical difficulty evidenced by the alternative test of residence as developed by the common law, and the Legislature has preferred the inclusion of a simple though arbitrary test to sole reliance upon a test the nature and scope of which is likely to be uncertain and to remain so.

This latter test, despite its possible uncertainty, is retained, although in a substantially modified form. It no longer talks of the place of "central management and control", but instead of "a head office", a phrase itself defined to mean "the centre of the company's administrative management". What are the effects of these alterations?

CENTRE OF ADMINISTRATIVE MANAGEMENT

The use of the term "head office" excludes the possible existence of another office of comparable status in another country, with the consequence that dual residence is not recognised under our statute. Reinforcement for this view is evidenced in the use of the noun "centre" (particularly as prefaced by "the") in the definition of "head office", as distinct from the adjective "central" embodied in the common law test, it being the writer's opinion that the noun positively excludes the possibility of divided "administrative management" whereas the adjective is and has been commonly used in a less precise and looser sense, as evidenced by the common law decisions.

The phrase "the centre of administrative management" is a modified form of the common law test of "central management and control", and is marked not only by the use of the noun "centre" but also by the addition of the qualifying adjective "administrative" to "management" and by the omission of "control" as a measure of residence.

OMISSION OF CONTROL

It has been noted already that the Courts have generally omitted reference to the element of control in their judgments,[100] and have addressed themselves almost exclusively to management. The exceptions have been those cases where the board of directors of the company has allowed

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100. See page 50 hereof.

its powers and functions to be exercised by another person or body, with the consequence that in these cases the board has divested itself of both management and control.[101]

As a consequence, no distinction has been made by the Courts between management and control, since in no case has it been necessary for the separation of management and control. It might be concluded from this that where a board of directors is subject to control by another body or person then, by virtue of such control, such a person or body in law and in fact manages the company's affairs, certainly at least in respect of those policy considerations the determination of which has marked the place of central management and control at common law.

Although the respective functions of the two words is unclear, the omission of control as a determinant of residence suggests that the Courts are no longer concerned to look beyond the formal decision-making process of the company. They are no longer concerned to ascertain who if anyone controls the decisions of the board of directors, except in the situation where the board of directors divests itself of its powers and functions by not meeting[102] or by processing decisions made by another person or body in such circumstances that the company is a cloak for another person or body, or is merely an agent for another person or body.[103]

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101. e.g. Unit Construction Coy. Ltd. v. Bullock (supra).

102. In such a situation as in Unit Construction Coy. Ltd. v. Bullock (supra).

103. e.g. Malayan Shipping Coy. Ltd. v. F.C. of T. (supra)

It is however submitted that the Courts would be loathe to disregard the corporate structure and decision-making machinery, which view is evidenced first by the removal of control and secondly by the insertion of the adjective "administrative" before "management", the effect of which is to emphasise the Courts' concern with the formal decision-making machinery.

The meaning of the term "administrative management" is far from clear, however, and there are three alternative interpretations possible:

(a) the formalised processing of the company's machinery,

(b) the day-to-day conduct of a company's affairs, or

(c) the overall direction and decision-making of the company.

The first interpretation envisages the compliance with legal requirements to keep alive the corporate entity, such as the processing of share transfers, the preparation of returns, the affixing of the company seal, the keeping of the company's records and other functions of a like nature, which need not necessarily have any association with the substantive part of the company's management and affairs. Support for this conception is evident in a number of cases,[104]

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104. See Swedish Central Railway Coy. Ltd. v. Thompson (supra) in which case the company was held to be resident in England even though the only functions of the committee of directors was to transact merely formal administrative business in the United Kingdom such as dealing with transfers of shares in the United Kingdom, affixing of the company seal to share certificates, and signing cheques on the London bank account. See also North Australian Pastoral Coy. Ltd. v. F.C. of T. (supra) where Mr. Justice Dixon made reference to a branch office of the company in its earlier years which was "the place of meeting for directors and shareholders and for the administration of the company", yet in that case it was successfully argued that a part of the superior directing authority was exercised on the farm property of the company. Mr. Justice Dixon appears to have used the term "administration" as distinct from the overall direction of the company's affairs as well as its day-to-day conduct of operations, which took place in the Northern Territory.

but it is in contrast to the common law conception of that management involving the overall guidance and direction of the company's affairs as being the decisive measure of residence.

Furthermore, if one is primarily concerned with the place of the real business of a company, it is unacceptable to see this in terms of the place of compliance with legal formalities irrespective of the place of the company's business and the decision-making procedure associated with the same.

The second interpretation is subject to the same criticism, for the place of the company's trading operations, where the day-to-day operations of the company are conducted, need have no relationship to the place where the overall direction of the company's affairs takes place,[105] and the common law decisions make it apparent that the place of trading operation alone is inconclusive.

The final and preferred interpretation of "administrative management" as meaning the overall direction and management of the company's affairs has been used in a number of English and Australian decisions,[106] and is strengthened by the use of the term "head office" in our provisions. If this interpretation is accepted, it merely embodies the common law position, and it can be contended that the term "administrative" is thereby rendered superfluous.

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105. see San Paulo (Brazilian) Railway Coy. Ltd. v. Carter (supra) and Koitaki Para Rubber Estates Ltd. v. C. of T. (supra).

106. see New Zealand Shipping Coy. Ltd. v. C.H. Thew (supra) where the London Board was said to have exclusive control of the financial and administrative business of the company.

However, it is submitted that the term has been inserted to emphasise that the Court is not concerned with the place of control but with the place where decisions affecting the company's general affairs are made. It accentuates the fact that management is not to be attributed to the controlling shareholder who dictates the decisions of the directors, but is to be attributed to those persons who in a formal sense make the decisions and implement them.[107]

PRACTICAL IMPLEMENTATION

Accepting the test of corporate residence[108] as being the centre of the overall direction and management of a company, we again encounter those difficulties encountered in the English decisions of identifying those matters the determination of which constitute overall direction and management.

It is apparent from the English decisions already discussed[109] that the Courts' concern is not with the place of the company's business but with the place where policy matters affecting the company as a whole are decided. It is therefore submitted that the centre of administrative management is the place where policy decisions are made affecting the whole company; it would always be of assistance in determining such residence to establish that tangible features of a company's

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107. Implementation is here not used in an active sense, but would be satisfied by the delegation to others to put into effect the decisions formally resolved.

108. Aside from incorporation in this country.

109. See pp. 41-44

presence are in this country, such as the company seal and its register of members, but such matters are incidental to the main inquiry.

There is one situation where the place of overall management becomes especially difficult to diagnose.

If an international company has several spheres of interest, with separate and distinct trading operations in different countries, can that company be resident in each and, if so, upon what factors is this dependant? This question was considered in Egyptian Hotels Ltd. v. Carter (supra) where, on the facts of that case, the local company, whose operations were wholly independent of the parent company, was held to be resident where its parent board of directors met.

It is submitted that this decision is a proper one, for the local board had no independent existence of the company as a whole; it was not a separate entity, and the localised operations were therefore a part of the whole, even if run independently. This was more apparent in New Zealand Shipping Coy. Ltd. v. Thew (supra) where the localised operations were clearly a part of the whole, but it is submitted that it is only where the local operations are run by an independent company that they can justifiably be excluded.[110]

In the event that the local operations are independently run, as they were in effect in Egyptian Hotels Ltd.

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110. This view conflicts with that expressed by Lord Atkinson in his dissenting judgment in Swedish Central Railway Coy. v. Thompson (supra), where he stated that if the enterprises of the company in different locations were "really separate enterprises, independent of one another", then they would be resident in different locations (see p.511 of report)

v. Carter (supra), one is still concerned with the overall management of the company, which will be the place where the local operations around the globe are coordinated. If no co-ordination is required, and the only action taken by the parent company is to prepare the accounts, it is considered that the Courts would still consider that the head office of the company was elsewhere than New Zealand, if only by virtue of the limited involvement of the local board in the localised operations. The potential overriding power of the central parent board would persuade the Court to so hold, despite the inconsistency of such a holding in terms of the powers and functions by which "administrative management" would in most circumstances be judged.[111]

CONCLUSION

The second determinant of corporate residence in this country, embodying a modified form of the common law test, is subject to the same degree of uncertainty. Although control has been omitted as a measure of residence, its presence in the common law decisions had largely been ignored. The main assistance derived from its omission is the emphasis thereby placed on management, and coupled with the term "administrative", it is submitted that the Courts will be unwilling to disregard the directors as the source of managerial powers. In the event of the division of such powers, the same problems evidenced in the common law arise, and the determination of residence will

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111. i.e. there can be no overall management and direction by the parent board if the local board is autonomous.

here depend upon the location of the functions of overall management and direction of the company's affairs.

PART III RESIDENCE OF PARTNERSHIPS AND TRUSTS

INTRODUCTION

The subject of the law in New Zealand is a "person" who in practice is generally an individual; with the advent of corporate existence, the law recognised a company as a separate entity and as a legal "person", but the law has not recognised the separate existence of partnerships and trusts and sees them in terms of the individual persons of which they are comprised.

PARTNERSHIPS

In England, the separate existence of partnerships is recognised, and they are therefore separately taxed. The residence of the partnership depends not on the residence of its individual partners, but upon the place where the central management and control of the partnership is exercised.[112]

In New Zealand, however, partners are individually assessed in respect of their share of the partnership income, since the separate existence of the partnership is not recognised.[113] The partnership does not therefore have a country of residence, since it is not a taxable entity, and residence so far as partnership income is concerned attaches to and is determined by the residence of each individual partner to the extent of his share in such income.

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112. see "Simon's Taxes" Vol. E p.821.

113. see Section 10 Land & Income Tax Act 1954, which makes provision for the filing of returns by partners.

TRUSTS

The position of Trusts in this country is more difficult.

The separate identity of the Trust is not recognised except to the extent of its embodiment in the Trustees appointed to administer it, who are jointly assessed in respect of Trust income in their capacity as trustees as if they together constituted a "person" for tax purposes.

The treatment of Trusts in England appears to be governed by specific statutory provisions imposing capital gains tax upon Trusts. Pursuant to these provisions it is presumed that all Trusts are resident in the United Kingdom unless both the following tests are satisfied:

(a) the general administration of the trust is carried on outside the United Kingdom, and

(b) the trustees or a majority of them for the time being are not resident or not ordinarily resident in the United Kingdom.

Although these provisions are of a special nature, dealing only with a specific form of tax, it has been suggested that the general treatment of Trust income will follow this approach.[114]

The position in Canada appears to be the subject of some uncertainty, but nevertheless the probable position is

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114. See "Simon's Taxes" Vol. E6.p.401. There have been no judicial pronouncements in England dealing with the residence of Trusts.

that a Trust is resident where the trustee having ownership or control of the Trust property resides.[115]

The position in New Zealand is also in an uncertain state. Section 155B Land & Income Tax Act 1954 provides that trustees are assessable for income tax on that income which is not also income derived by a beneficiary in terms of Section 155A.

Income in terms of our Act comprises that which is derived from a New Zealand source and that which is not derived from a New Zealand source. The scheme of the Act is to tax both kinds of income where the recipient is a resident in this country, but only income derived in this country where the recipient is not resident in this country.

Since our Act does not specify the manner in which the residence of trustees is to be determined, the nature of the assessable income is left unclear.

The High Court of Australia was confronted with a similar difficulty in the Australian statute in Union Fidelity Trustee Company of Australia Ltd. v. F.C. of T. (1969) 119 C.L.R. 177. In this case, income of a Trust estate was received from sources outside Australia by a trustee resident in Australia, and there was no beneficiary presently entitled to that income. The question therefore arose as to whether this income was assessable in the hands of the trustee.

As in our statutory provisions, in Australia income

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115. For an extensive discussion of the Canadian position, see R. A. Green "The Residence of Trusts for Income Tax Purposes" XXI Can.T.J. 217.

in the hands of the trustees to which no beneficiary is presently entitled is assessable to income tax, but no provision is made for the determination of the residence of the trustees such as to clarify whether all income derived from whatever source is assessable or only income derived from an Australian source.

In the light of this omission, the Chief Justice said:[116]

> "It is therefore clear to my mind that if nothing is known as to the residence of a taxpayer the only income which can certainly be said to be assessable income is the income derived by the taxpayer from an Australian source. Unless it is known that he is a resident, it cannot be said that any other income is to be included in his assessable income."

The Court was reluctant to adopt a test of residence for trustees based on their individual place of residence. Thus, Mr. Justice Kitto stated:[117]

> "This is a sufficiently odd conclusion to make one suspicious of it; for not only is the intention highly unlikely that taxability in respect of a trust estate should depend upon so fortuitious and arbitrary a consideration as the residence for the time being of the trustee,

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116. (1969) 119 C.L.R. 177, 181

117. ibid. p.187

> but if that had been the intention some answer would almost inevitably have been provided for the obvious question: what if there are several trustees of whom some are residents and some are non-residents?"[118]

The High Court therefore held that the trustees were assessable only in respect of Trust income derived from an Australian source; it also held that the assessment of a beneficiary's share in the Trust income where such beneficiary had a present title in possession to such a share, whether or not he be under a present disability, was to be similarly limited to income derived from an Australian source. Moneys subsequently received by the beneficiary from an ex-Australian source would be taxed upon receipt if that beneficiary was resident in Australia.

Whether or not this approach will be followed in New Zealand is dependent upon the effect of the decision of the Court of Appeal in C. of T. v. Johnson & Maeder (supra) where the Court applied a test of the residence of trustees on the basis of their place of residence.

In that case, the question at issue was whether the trustees were chargeable to a social security charge. It was argued that section 124 of the Social Security Act 1938 imposed a charge upon trustees irrespective of residence, whereas the main charging provision in respect of persons generally and a special provision dealing with companies

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118. This problem was also mentioned by the Chief Justice in F.C. of T. v. Belford (1952) 88 C.L.R. 589, 597.

both specified residence as being necessary for such a charge to be imposed.

The Court considered that the provision should be strictly construed against extraterritorial application and, since the other provisions depended upon residence, residence was found to be necessary in respect of trustees. It had been argued alternatively that the section should be construed to apply only to income earned in New Zealand,[119] but Mr. Justice Callan preferred to found the section's application upon residence.[120]

In applying this test of residence to the trustees in that case, he looked to their place of residence, not to the place of control or any other form of criteria.

It is submitted that, despite the merit of the Australian approach, this New Zealand decision is not easily distinguishable. Although it involved the construction of a different statute, the substantive questions at issue were identical to those posed by the Land & Income Tax Act 1954. Just as in the Social Security Act 1938 residence was made the determinant of chargeability to social security tax, so also in the Land & Income Tax Act 1954 is it made the determinant of assessability to income tax.

The result opens the way to the anomalous position feared by the High Court of Australia whereby assessability to

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119. This construction would have resembled the approach of the Australian High Court.

120. [1946] N.Z.L.R. 446 at p.466

income tax becomes dependent upon the fortuitous residence of the trustees. However, the result in practical terms is no worse than the Australian provision, for it automatically taxes all income derived from New Zealand, but goes further in taxing all income if the trustees are resident in New Zealand.

In the event of there being no majority of trustees in New Zealand, it is submitted that the New Zealand Courts would be likely to adopt the English test of the place of the general administration of the Trust. There is however no authority for this view, and it is based entirely on the need for a practical solution in such a situation.

Where income is derived by beneficiaries in terms of section 155A Land & Income Tax Act 1954, it is submitted that in New Zealand the residence of the beneficiary will determine the liability to tax of the income received, in the same way that it is submitted that the residence of the trustees would do so where no beneficiary is specifically entitled.[121]

The legal position with respect to the residence of Trusts in this country is unsatisfactory, and is urgently in need of clarification.

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121. If, however, the Australian decision in Union Fidelity Trustee Company of Australia Ltd. v. F.C. of T. (supra) were followed, it is submitted that their construction of the position of the income of beneficiaries in the provision with which they were there concerned would apply equally to the position of the income of beneficiaries deemed to be derived in terms of section 155A Land & Income Tax Act 1954.

PART IV DOUBLE TAXATION AGREEMENTS

PRELIMINARY

It has already been noted that the Land & Income Tax Act 1954 imposes liability for taxation upon residents of this country, but no discussion of this subject would be complete without reference to the bilateral agreements which New Zealand has with a number of other countries dealing with residence.

These agreements are designed to eliminate the possibility of dual residence between the countries party to such agreements, since the effect of such dual residence will otherwise be that both countries claim the primary right to tax a person on all his her or its income, wherever derived.

In the absence of such bilateral agreements, provision is made in the Act[122] for the giving of credit to a person in respect of tax paid in the country where the income was derived, but this provision allows no credit where several countries claim the primary right to tax all his income on the basis that he comes within their conception of residence, and the possibility therefore exists that he may be taxed twice.[123]

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122. Section 170 Land & Income Tax Act 1954

123. This would however only be to the extent of the difference between the rate of income tax imposed in the country in which the income was derived (for which a credit is allowed) and the rates of income tax payable in the two countries claiming residence (if neither of them is the country in which the income is derived). If the country of source claims residence, then the taxpayer effectively pays the higher rate of the two countries claiming such residence.

INDIVIDUAL RESIDENCE

In most of the Agreements which New Zealand has with other countries,[124] the definition of a resident individual is such that a person might come within the definitions of residence of both countries.[125] While this would seem in practice most unlikely, its consequence would be to negate the whole purpose of the Agreement.

The possibility has been excluded in the Agreements with the United Kingdom and Australia. If both countries claim residence, criteria are specified whereby the country of residence is to be determined.

Thus, in the Agreement with the United Kingdom, the following tests are applied in succession:

(a) the territory in which he has a permanent home is deemed to be the country of residence, or

(b) if he has a permanent home in both countries, the country of residence will be determined by having regard to the territory with which he has the closest personal and economic relations; or

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124. We have agreements with Australia, United States of America, Canada, United Kingdom, Sweden and Japan.

125. Thus, in the Agreements with the United States, Canada, Japan and Sweden, a resident of New Zealand is defined as any person who is resident in New Zealand for the purposes of New Zealand tax and is not a resident of those other countries for the purposes of their tax; the converse definition applies to residents of these countries. Just as a person coming within the English definition of a resident could also come within our own, so also it would seem possible for a person to be dually resident under the terms of these Agreements.

(c) if that test is indeterminate, the question is decided on where he has an habitual abode, or

(d) if he has an habitual abode in either or neither territory, he is deemed to be a resident of the country of which he is a national, or

(e) if none of these apply, it is decided by mutual agreement between the two countries.

The term "a permanent home" can be distinguished from the term "his home" in our own statutory provision, since the former term resembles the term "permanent establishment" considered in the early English authorities to mean a physical dwelling, and can therefore be expected to have the same meaning.

A person with no permanent home in either country who makes regular visits to that country with which he has had some prior association would not be embraced by this test, but would be covered by the second test of personal and economic relations. One possible difficulty that might arise with this latter test would be in the event of the personal and economic relations of the person being divided between the two countries, but in this situation they would need to be balanced and weighed up, and in the event of no agreement being reached, then the alternative test of habitual abode would come into operation.

The term "habitual abode" bears some resemblance to the phrase used in the Australian provision, "usual place of abode", and its effect appears to be that a person who regularly visits a country, even though he has no personal or economic ties with, and no permanent establishment in that

country will be regarded as resident in that country for the purposes of the Agreement.

It is noticeable that this test talks not of an "habitual place of abode", but of an "habitual abode", and it is submitted that this terminology excludes the necessity of a physical dwelling in order to satisfy this test.

The comprehensive nature of these criteria is preferable to the brevity evident in those other Agreements referred to, since it effectively excludes the possibility of dual residence, while at the same time specifying those circumstances upon which residence will be determined, thereby enabling the taxpayer to be aware of his legal position.

CORPORATE RESIDENCE

The criteria specified in the Double Tax Agreements relating to corporate residence vary.

The American Agreement provides that a company will be resident in New Zealand if incorporated in this country or if it is managed and controlled here; an American company is one created or organised in, or under the laws of, the United States.

The Japanese Agreement provides that a New Zealand company is any company the business of which is managed and controlled in New Zealand and which does not have its head office in Japan; a Japanese company is similarly classified in the converse situation, subject to some adjustments.

The Canadian Agreement applies the sole test of the

place where the company is managed and controlled, a test common to both of the other Agreements referred to. This test is far from clear,[126] but in practice, since the purpose of the Agreement is to attribute residence to one of the countries party to the Agreement, that country in which the powers of management and control are more often exercised will be held to be the country of residence.

The English Agreement goes further, and provides that the residence of a company in New Zealand will be where:

> "(a) the company is incorporated in New Zealand and has its centre of administrative or practical management in New Zealand (irrespective of whether overriding control or policy can be dictated by any person from outside New Zealand), or
>
> (b) the company is managed and controlled in New Zealand."[127]

The last criterion is identical to that contained in the Canadian Agreement and requires no further discussion.

The test for companies on the basis of their place of incorporation appears less demanding than for a company incorporated in neither of the countries party to the Agreement. Thus, a company incorporated in a country party to the Agreement will be there resident if its "centre of administrative or practical management" is located there,

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126. As has been seen in the English common law decisions, where the test of central management and control involves many similar considerations.

127. An English company is similarly defined.

whereas for a company incorporated abroad it is necessary that it be managed and controlled there.

It is submitted that the introduction of the term "practical management" coupled with the specific exclusion of overseas control and influence and the omission of reference to the company's head office as appears in our own provision, emphasises the relevance of the place of the conduct of the day-to-day trading operations of the company, as distinct from the place of overall management and control.

It might be said that the term "administrative" takes colour from the term "practical", but it is submitted that it retains its meaning in our Act of overall direction of the company's affairs; the term "practical" is an alternative criterion of corporate residence, and the two terms are therefore not complementary.

Although the provision excludes all forms of overseas control and influence, where an overseas board retains the overall management and direction of the company, it is submitted that it would not fall within the compass of this test, since its "administrative management" is abroad. In this situation, the existence of the company's "practical management" in New Zealand, in the sense of its trading operations, would constitute it as a resident in this country, despite the fact that its administrative management may be abroad.

This situation illustrates the possibility of the two parties to the Agreement claiming dual residence. Thus, if a company is incorporated in New Zealand and has its centre

of practical management in this country, but its centre of administrative management in England, it is in terms of the provision resident in both.

Similarly, a company incorporated in New Zealand may have its centre of practical management in this country but be managed and controlled from England.[128]

As in the case of individual residence, it is submitted that in terms of the Double Tax Agreements the possibility of dual residence has not been excluded, although its likelihood is remote.

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128. A situation similar to that which arose in Egyptian Hotels Ltd. v. Mitchell (supra)

PART V REFORM

No consideration of the law is complete without some appraisal of its present adequacy. Having examined the nature and scope of residence in this country, it is therefore appropriate at this stage to do this.

INDIVIDUAL RESIDENCE

The embodiment in statutory form of a definition of individual residence in this country has failed to provide the clarity that was lacking in England in the absence of such a statutory definition. Indeed the adoption of a new phrase unrelated to the common law has in a sense increased the uncertainty, since not only is it necessary to construe the meaning of the new phrase, but this must be done against the backdrop of the common law.

It is submitted that our provisions should spell out more clearly the circumstances in which one is to be treated as a resident of this country, rather than rely solely upon the phrase "his home", the precise meaning of which is so unclear.

The Australian approach illustrates the type of provisions desired, for the Courts are presented with more definite guidelines within which to work;[128] its major weakness

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128. Section 6 of Income Tax & Social Services Contribution Assessment Act 1936 defines "resident" or "resident of Australia" as meaning:
(a) a person, other than a company, who resides in Australia and as including a person:
(i) whose domicile is in Australia, unless the Commissioner is satisfied that his permanent place of abode is outside Australia;
(ii) who has actually been in Australia, continuously or intermittently, during more than one half of the year of income, unless the Commissioner is satisfied that his usual place of abode is outside Australia and that he does not intend to take up residence in Australia, or
(iii) who is a contributor to the superannuation fund ... or who is the spouse or child under sixteen years of age of such a contributor.

is its retention of the common law tests of residence, leaving the relationship of the statutory and common law criteria unclear. In practice, the Australian Courts have generally been able to determine residence under both heads with the same result, but it is submitted that the statutory criteria are comprehensive enough in themselves without the need for retaining the common law tests.

Subsection (i) of the Australian definition embraces the position of a person whose domicile is in that country, and he is effectively presumed to be a resident of that country unless he has a permanent place of abode abroad. This adequately clarifies the relationship which creates residence, whereas the reliance solely on the phrase "his home" in our provision leaves it to the Courts to construe the application of this phrase in a particular case; as has already been suggested, it is thought likely that our Courts will construe our section on the lines of this part of the Australian provision, in which case it seems preferable to incorporate it into our statute.

Subsection (ii) of the definition deals with the position of persons without Australian domicile who spend in excess of six months in that country. Whereas in India and Canada, a person in these circumstances is deemed to be resident in those countries,[129] in Australia he will be so regarded unless he can satisfy the Commissioner that his usual place of abode is abroad and that he has no intention of taking up residence in Australia.

This provision is unsatisfactory to the extent that

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129. See World Tax Series publications on these countries.

it is unclear what "taking up residence" requires. It may be construed as meaning "a permanent place of residence" (similar to domicile) as distinct from the common law conception of residence, (which is the very matter which is the subject of the provision): In this case, the provision effectively embraces any person with no usual place of abode abroad, even though such a person may have no intention of taking up residence; and this would seem to be the category of person the provision is intended to include.[130]

However, a person having a usual place of abode abroad who is forced to remain in Australia in excess of six months and, perhaps in excess of twelve months, would not on this construction be regarded as there resident so long as he had no intention of taking up residence there. This suggests that the term "taking up residence" means something less than "an intention to permanently reside" and instead means an intention to reside in Australia for a sustained length of time, a sustained period of time being not less than twelve months.

This suggestion is arbitrary, and illustrates the danger of reintroducing "residence" by the back door as a criterion. It is fraught with all the uncertainty of meaning these provisions are designed to avoid.

It is therefore submitted that the Australian provision would be more satisfactory if the test of "intention to take up residence" were omitted, in which case all persons

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130. Miss Reid's equivalent would therefore come within these criteria.

present in Australia for in excess of six months would be held to be resident unless they could establish that their usual place of abode was abroad.

The final criticism of both the Australian provisions (i) and (ii) is their employment of the phrase "place of abode" which suggests a physical dwelling as being necessary; in order to avoid such a narrow construction, it is submitted that the word "abode" should be employed in isolation.

It is submitted that with these modifications, the Australian statutory criteria (provisions (i) and (ii)) should be adopted in this country. In so doing, the possibility of residence on the basis of regular annual visits of less than six months is excluded, but it seems unnecessary to attribute residence to persons on the basis of such short-term visits, even if residence were only attributed in respect of the particular period of time during which such persons are present.

It is clear from this that it should be made clear by inclusion in the body of the statute whether residential status results in assessment to tax for the entire income year or for that part only during which residential status is held; the statute is not clear on this point at present.

The inadequacy of the present provision is its failure to clearly specify those circumstances which constitute a person resident in this country for tax purposes. It is suggested that the above modifications would greatly assist in clarifying those circumstances.

CORPORATE RESIDENCE

In the same way that the Legislature has defined individual residence by the employment of a criteria of uncertain scope, so also has it defined corporate residence.

In its effort to clarify the uncertainties of the common law, it has modified the common law test in such a way that the criteria of corporate residence in this country are subject to some doubt.[131]

If, as has been suggested by the writer, the term "administrative management" means the overall guidance and direction of the company's affairs, then these words should be employed so as to avoid the ambiguity presently surrounding the word "administrative".

It is perhaps also desirable that the statute expressly direct that the centre of administrative management shall be the place where meetings of directors are held unless it be established that the decisions of overall direction and management of the company's general operations are determined by some other body or person, provided always that if there be more than one board of directors, then that board making the decisions of overall direction and management shall be the centre of administrative management.

It is noticeable that the Australian definition of

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131. This comment relates to the second criterion of corporate residence; the first, that of incorporation, is perfectly clear in its meaning.

corporate residence[132] introduces a new test of corporate residence based on the place of residence of the majority of shareholders. Such a provision would in this country reintroduce the test of control apparently abandoned by our present provision.[133]

It is submitted that there is no necessary relationship between the existence of the potential to control a company's affairs and the actual realisation of such potential, and if such control is exercised, then it is possible that the persons exercising such control may be said to be managing the company's affairs. The introduction of this test would bear little if any relationship to the place of the company's management, and it is submitted that it should not therefore be adopted in this country.

It does highlight the need however for a close scrutiny of the function of corporate residence, such scrutiny having been noticeably absent in the past.

If the test is to be the place of real management, then one must look to the source of direction of the company's affairs, if by contrast it is to be the place of the company's operations, then residential status should be broken down into

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132. Section 6 of Income Tax & Social Services Contribution Assessment Act 1936 defines corporate residence as:
"(b) a company which is incorporated in Australia, or which, not being incorporated in Australia, carries on business in Australia, and has either the central management and control in Australia, or its voting power controlled by shareholders who are residents of Australia."

133. In contrast with the Court's approach in The Gramophone & Typewriter Ltd. v. Stanley (supra) in which it was stated that the large nature of a shareholding did not necessarily mean that the person with such a shareholding was in control of the company's affairs.

localised operations.

In this area, it is probable that any test adopted will to some extent be artificial, but it is submitted that efforts to introduce new tests should be examined closely so as to ascertain the rationale of such a change.

TRUSTS

The failure of the Land & Income Tax Act 1954 to specify the criteria for the determination of the residence of trustees is the most glaring inadequacy in the present Act.

The Carter Commission in Canada suggested that a Trust should be taxed as a Canadian resident in either of the following circumstances:

"1. When the trustees, a majority of the trustees, or a controlling group of the trustees are resident or ordinarily resident in Canada.

2. When a Trust carries on substantially all of its business in Canada or where substantially all of its property is situated in Canada."[134]

The first arm of this recommendation embodies the approach adopted in the United Kingdom[135] and is considered by the writer to be the preferable approach. The second arm appears inconsistent with the tests of residence applied

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134. "Report of the Royal Commission on Taxation": Queens Printer, 1966 vol. 4 pp. 195-6.

135. see the earlier reference to the approach likely to be adopted in England at p. 74 hereof.

to both individuals and companies, in respect of whom the place where their business is carried on or where their property is owned is not conclusive.

Since this entire area of the law has developed haphazardly and without unified direction, it is submitted that no new tests of residence in this country should be adopted in respect of any one legal "person" where that test has not been established in respect of another legal "person" in respect of whom it would have been equally applicable.

CONCLUSION

The effect of residence is that a "person" is taxed on the whole of his world-wide income, and it is therefore submitted that a person should be resident in one country only. However, a person's relationship to various countries may often be equally balanced between more than one country, in which event some modification of this broad statement is necessary.

It is the writer's view that the Courts have lost sight of the function of residence, and have tended to attribute residential status to a person even though his her or its association with the country is less than that association held with another country.

The approach apparent in the Double Taxation Agreements appears preferable in the sense that residence is determined in terms of relativity to another country. It is this aspect that has tended to be ignored by the Legislatures and Courts in various countries, which have sought to introduce tests applicable in the isolation of their own tax jurisdiction.

This is an area of the law of growing importance, and cannot safely be ignored. The uncertainty of the present legislative provisions in this country poses a danger of injustice to "persons" who are unable to comprehend beforehand what that legal position is. It is therefore an area that demands the attention of the Legislature.

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