THE PROBLEM ON COLLECTING TAX FROM RESIDENCE RULE BY APPLYING THE DOCTRINE OF EFFECTIVE MANAGEMENT

BY

MS. ONCHALEE RATTANACHIRASOOD

AN INDEPENDENT RESEARCH PAPER SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENT FOR THE DEGREE OF MASTER OF LAWS (IN BUSINESS LAW)

GRADUATE SCHOOL OF LAW
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Research Title:	The Problem on Collecting Tax from Residence Rule by Applying the Doctrine of Effective Management
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ABSTRACT

The tax law and practices of the country where a company is established or carries on its business govern its tax residence. It is generally decided by either (i) the place of incorporation or legal seat, or (ii) the location of management or real seat.

The place of effective management is used to decide the tax residence in several countries. It could signify either superior management or day-to-day management. The term ***"effective management"*** is now defined under the OECD Commentary Update 2003. It is "the place where key management and commercial decisions that are necessary for the conduct of the entity's business are in substance made."

Using the place of incorporation only in determining the corporate residence is the loophole of the Thai Revenue Code and it can affect to the Double Tax Treaty between Thailand and other countries also. It is because the interpretation of the resident of the Contracting States under the Double Tax Treaty between Thailand and other countries is according to the law of Thailand, which is the Thai Revenue Code.

The enforcement and interpretation of the term "resident company" of the Thai Revenue Code and the Double Tax Treaty between Thailand and other Countries by considering a place of incorporation only is inefficient. Thai Government can not impose corporate income tax effectively from worldwide income of the company not incorporated in Thailand but having effective management in Thailand because the

company is not resident in Thailand under the interpretation of the term "resident company" of the Thai Revenue Code which considers only the place of incorporation, not including the place of effective management. Besides, it causes tax avoidance.

From the problems, it should be improved by considering a place of effective management together with the place of incorporation because it is more effective than considering a place of incorporation only. The Thai Revenue Department can impose tax more effectively than using only the place of incorporation.

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Onchalee Rattanachirasood

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Chapter 1
Introduction

1.1 General Statement of the Problem

The Rules for income tax purpose which the States all over the world use for determining tax burden of person who has income have three rules which are Residence Rule, Source Rule and Nationality Rule. Thailand uses Residence Rule and Source Rule in imposing income tax. Residence Rule is applied to resident company of Thailand. Under the Residence Rule, when any person is resident of any country, that person must have a duty to pay tax to that country from worldwide income regardless whether income derived from doing business in that country or not. It is according to Worldwide Income Basis. So, the income derived from other country outside resident country is brought to calculated income tax. Any company organized or incorporated under Thai law is a resident of Thailand and the Residence Rule will be applied to that company. Source rule is applied to a non-resident company. Under the Source Rule, when any person has income from any country, that person shall have a duty to pay income tax to that country. It is the rule that regardless residence or nationality of that country of the person who has income. Any non-resident company must be taxed in Thailand on income derived from sources in Thailand.

Some problems may be occurred if any person would like to avoid paying income tax under residence rule. The reason is that the residence rule is worldwide income basis. Any resident company of Thailand which is incorporated under Thai law must be taxed on its income derived from sources both in and outside Thailand or its worldwide income. And another reason is that under the Thai law the resident company is considered only the place of incorporation. So, any person may avoid paying Thai corporate income tax from worldwide income under residence rule by not incorporated in Thailand but incorporated in foreign country instead which has no tax or low tax (corporate income tax). Thai Government may not be able to impose tax effectively for this case. The reason is that if the company incorporated in foreign country has its central management and control exercised in Thailand i.e. the majority of the board meetings (effective management) are held in Thailand, under the Thai law the company is a non-resident company not a resident company of Thailand. So, Thai Government can not impose corporate income tax from worldwide income of this company despite this company has effective management in Thailand.

This Independent Research Paper is conducted to find these problems and searching recommendations to solve them.

1.2 Objective of the Research Paper

1.2.1 To study the concept of Residence Rule under the Thai Revenue Code.

1.2.2 To study the concept of Residence Rule under Double Tax Treaty between Thailand and other countries.

1.2.3 To study the concept of Residence Rule under OECD Model Taxation Convention and UN Model Taxation Convention.

1.2.4 To study the concept of Residence Rule under foreign law.

1.2.5 To analyze problems arising from enforcement and interpretation of Thai Revenue Code and Double Tax Treaty by using Residence Rule.

1.3 Scope

This research paper studied Section 39 and Section 66 of the Thai Revenue Code only. The other Sections of the Thai Revenue Code are not concerned. It studied residence rule under OECD Model Taxation Convention and under UN Model Taxation Convention including residence rule under the Double Tax Treaty also.

1.4 Hypothesis

The enforcement and interpretation of the Thai Revenue Code and Double Tax Treaty between Thailand and other Countries by using Residence Rule is inefficient and cause tax avoidance because of using the doctrine of incorporation. It should be improved by modification of the Thai Revenue Code or by interpretation of the Thai Revenue Code by using the doctrine of incorporation together with the doctrine of effective management.

1.5 Methodology

This research paper uses the Documentary Research. It is a study of the laws concerned which are the Thai Revenue Code, the OECD Model Law, the UN Model Law, the case law of the United Kingdom, the EU Directive, the Thai Supreme Court Decision, the Tax Rulings of the Thai Revenue Department and the articles concerned.

1.6 Expectation

1.6.1 To understand the concept of residence rule under the Thai Revenue Code and the concept of residence rule under the Double Tax Treaty between Thailand and other countries.

1.6.2 To perceive the problems arising from enforcement and interpretation of Thai Revenue Code and Double Tax Treaty by using Residence Rule.

1.6.3 To recommend the ways to solve the problems arising from enforcement and interpretation of Thai Revenue Code and Double Tax Treaty by using Residence Rule by referred the ways of the foreign countries in solving these problems.

Chapter 2
The Rules of Imposing Tax to the Taxpayer

2.1 Concept of Residence Rule and Source Rule

The Rules that the States all over the world use for imposing income tax are Residence Rule, Source Rule and Nationality Rule. But the rules accepted by various civilized country including Thailand are Residence Rule and Source Rule.

Residence Rule

Residence rule is the case that the country imposing tax has relationship with the person who has income. It is a principle of taxation under which all income accruing to residents of a country, regardless of its source, is subject to tax by that country.[1] It is that the country imposing tax is residence of the person who has income. This rule comes from the concept which is that whoever normally residing in any country uses natural resources or public services in many forms which such country provides for such as basic public utility, safety in life, body, healthy, property, rights, freedom, etc. while he has a part in making pollution in any form in residing in that country. In economic it is deemed to be a social cost. Therefore, such resident country should receive compensation in the form of right to imposing tax from resident in that country[2].

Residence Rule is that when any person has resident in any country, that person shall have a duty to pay income tax to that country, regardless of what nationality he has and regardless of where the source of income derived. That person has to bring that

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[1] Brian J. Arnold and Michael J. McIntyre, International Tax Primer, (Hague: Kluwer Law International, 2002), p. 166.

[2] Thanapol Keawsathit, International Income Tax and A General Principle of Double Tax Treaty (Bangkok: Chuanpim, 2003), p. 2.

income to pay tax to resident country. It is according to worldwide income basis because it imposes income tax from income derived from worldwide not limited to income derived from only resident country. The income derived from other countries must be taxed also.

Source Rule

Source rule comes from the concept which is that whoever receiving income or any benefit deemed to be income from any country is deemed to have a part in using or making limited natural resources of such country to be wasted. Such country (Source country) should receive compensation in the form of rights to imposing tax from the person who has income for nourishing the source country[3].

Source rule is a principle of taxation under which residents and non-residents alike are taxed on income from economic activity within a particular country.[4] It is that when any person has income from any country, that person must have a duty to pay the income tax to that country. It is the rule that imposes tax to the taxpayer regardless of the nationality of the taxpayer. This is the case that the country imposes income tax by relying on relation between the country and source of income. It is the rule used for imposing income tax calculated from income arising in source country only. This rule can be called "the Principle of Territoriality".

For example:

1) Income paid from or in the source country but the activity causing income may be not done in that source country.
2) The activity incurred income is done in the source country regardless whether or not paid in or from that source country.

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[3] Keawsathit, *supra* note 2, pp. 1-2.

[4] Arnold and McIntyre, *supra* note 1, p 166.

3) The asset incurred income located at the source country.

2.2 The Rules Applied in Thailand for Corporate Income Tax

When considering the provisions under the Thai Revenue Code in part of corporate income tax and the articles under the Double Tax Treaty between Thailand and other countries, it is found that there are two rules that are Residence Rule and Source Rule applied for imposing tax.

2.2.1 Residence Rule under the Thai Revenue Code and the Double Tax Treaty between Thailand and other countries

Residence Rule under the Thai Revenue Code

In Thailand, the rule of imposing corporate income tax according to residence rule is provided in Section 66 of the Thai Revenue Code. However, it must be considered together with the Civil and Commercial Code.

According to residence rule in Thailand, any legal entity having residence in Thailand must pay corporate income tax from income derived directly or indirectly from sources both in and outside Thailand. It is imposed corporate income tax from worldwide income because of having residence in Thailand.

Residence rule is applied for imposing corporate income tax from the company incorporated under Thai law according to the Thai Revenue Code. Under Thai law, any legal entity incorporated under Thai law is deemed to be a resident of Thailand. If any legal entity is not incorporated in Thailand, it is not a resident of Thailand and residence rule is not applied to it.

Under Section 65 and Section 66 of the Thai Revenue Code, all juristic companies or partnerships which are organized under the Thai law shall pay tax from net profit calculated from the income derived from their businesses. This is according to Residence Rule because these Sections means that all legal entity incorporated under the Thai law must pay corporate income tax from net profit of all their businesses derived from all over the world not derived from Thailand only (Worldwide Income Basis). If any legal entity is not incorporated in Thailand, it must not pay corporate income tax from net profit calculated from the income derived from all over the world under the Thai Revenue Code but it must pay corporate income tax from net profit calculated from income derived in Thailand only.

Residence Rule under the Double Tax Treaty between Thailand and other countries

When considering the articles in the Double Tax Treaty between Thailand and other countries in part of enterprise especially in the matter of business profits, it is found that there are two rules which are Residence Rule and Source Rule applied under the Double Tax Treaty between Thailand and Other Countries.

Under the Double Tax Treaty between Thailand and Other Countries in the matter of business profits, the profits of an enterprise of a Contracting State must be taxable only in that State. However, if the enterprise carries on business in the other Contracting State through a permanent establishment under the Double Tax Treaty, the profits of the enterprise may be taxed in that State but only so much of them as is attributable to that permanent establishment. In this matter of business profits, that the profits of an enterprise of resident country must be taxable only in resident country. It is according to Residence Rule because the enterprise having residence in resident country is imposed tax from worldwide income (Worldwide Income Basis) not limited to income derived from source in resident country. The income derived from source in other countries must be taxed also.

The Definition of Resident under Double Tax Treaty between Thailand and Other Countries

1) Double Tax Treaty between Thailand and the United States of America

Under the Double Tax Treaty between Thailand and the United Stated of America, the meaning of "resident of the Contracting States" is that any person who, *under the laws of that State*, is liable to tax by reason of his *domicile*, *residence*, *citizenship*, *place of management*, *place of incorporation*, or any other criterion of a similar nature.

The term "Resident" in case of legal entity generally means that if any legal entity is organized under laws of any country, that legal entity is deemed to have resident of that country. However, regarding as having resident may rely on other ways under the laws of United States of America as follows[5]:

(1) A place of Management
(2) A place of Head Office
(3) Nationality of the Legal Entity
(4) A place incurred major income
(5) Residence or Domicile of majority shareholders
(6) Residence or Domicile of the Board of Directors

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[5] Suwan Walaisathearn, Thai-U.S. Tax Treaty (Bangkok: Thammaniti, 1998), p. 47.

Under the law of the United States of America, "Domestic Corporations", defined by § 7701(a) (4) of the U.S. Code Title 26 to be corporations organized under the laws of the United States or any state, are also subject to United States taxation on worldwide income.[6] A domestic corporation is a resident corporation even though it does no business and owns no property in the United States.[7] Suppose that a group of German citizens owns a corporation that has property and operates only in Germany, employs only German nationals and sells products only in Germany. If the incorporation papers were filed in Delaware, the company would be a domestic corporation subject to the taxation of worldwide income by the United States.

Under the Article 2 of the Double Tax Treaty between Thailand and the United States of America, the existing taxes to which this Convention shall apply in the United States are the Federal income taxes imposed by the Internal Revenue Code. The United States of America has 50 states so the American citizen must have to pay tax in many processes as follows:

(1) Federal Tax
(2) State Tax
(3) County Tax
(4) City Tax

2) Double Tax Treaty between Thailand and the United Kingdom of Great Britain and Northern Ireland

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[6] Charles H. Gustafson and Richard Crawford Pugh, <u>Taxation of International Transaction</u>, (Illinois: CCH Incorporated, 1995), p. 45.

[7] Richard Crawford Pugh, <u>International Income Taxation (Code and Regulations)</u>, (Illinois: CCH Incorporated, 1997), p. 2175.

Under the Double Tax Treaty between Thailand and the United Kingdom of Great Britain and Northern Ireland, the meaning of "resident of a Contracting State" is that any person who, *under the law of that State*, is liable to pay tax by reason of his *domicile*, *residence*, *place of management, place of incorporation*, or any other criterion of a similar nature.

When considering the Double Tax Treaty between Thailand and other countries, the meaning of the resident in Thailand is according to the law of Thailand which is that any legal entity incorporated under Thai law is resident in Thailand. It is considered a place of incorporation only under the Thai law. If a place of incorporation is in Thailand, the legal entity is resident in Thailand. But if a place of incorporation is in foreign country, the legal entity is resident in foreign country.

However, under the Double Tax Treaty between Thailand and other countries if a person other than an individual is a resident of both Contracting States, it must be deemed to be a resident only of the State in which its *place of effective management*.

2.2.2 Source Rule under the Thai Revenue Code and the Double Tax Treaty between Thailand and other countries

Source Rule under the Thai Revenue Code

Source rule is applied for imposing corporate income tax from the company incorporated under foreign law. Thailand (Source country) imposes corporate income tax from foreign company both carries on business in Thailand and does not carry on business in Thailand. If any legal entity has income derived from or in Thailand, it must pay corporate income tax from income derived from or in Thailand not from worldwide income.

Source Rule under the Double Tax Treaty between Thailand and other countries

Under the Double Tax Treaty between Thailand and Other Countries in the matter of business profits, the profits of an enterprise of a Contracting State must be taxable only in that State. However, if the enterprise carries on business in the other Contracting State through a permanent establishment under the Double Tax Treaty, the profits of the enterprise may be taxed in that State but only so much of them as is attributable to that permanent establishment. It is according to Source Rule that the enterprise carries on business in the source country through a permanent establishment is imposed tax but only so much of them as is attributable to that permanent establishment not worldwide income (Territory Income Basis).

2.3 The Concept of the Doctrine of Incorporation

The concept of the doctrine of incorporation is that when any legal entity is incorporated in any country, that legal entity is resident of that country. The place of incorporation test is a rule under which a corporation is considered to be a tax resident of the country in which it is incorporated.[8] That legal entity must pay corporate income tax from the income derived from all over the world not limited to income derived from only resident country under the Residence Rule (Worldwide Income Basis). The income derived from other countries must be taxed also. Moreover, it is regardless whether or not the income is derived from carrying on business in that country.

Comparative Study of the Doctrine of Incorporation

1) Thailand

[8] Arnold and McIntyre, *supra* note 1, p. 166.

Corporate residence is determined by the place of incorporation. A company incorporated under the laws of Thailand is a domestic corporation. Place of management and control is not statutorily defined.

2) Japan[9]

A company incorporated under the laws of Japan is a domestic corporation. The nationality of its shareholders or place of central management is not pertinent. A corporation other than a domestic corporation is regarded as a foreign corporation.

3) Finland[10]

A company is deemed to be resident where it is incorporated.

4) Philippines[11]

A domestic corporation (a corporation organized under Philippine laws) is a Philippine resident.

5) Sweden[12]

A company is considered to be resident if it is incorporated in Sweden.

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[9] PricewaterhouseCoopers, Corporate Taxes 2001-2002 Worldwide Summaries (Canada: John Wiley & Sons, Inc), p. 338.

[10] PricewaterhouseCoopers, *supra* note 10, p. 227.

[11] Arthur Anderson, Asia and the Pacific…a Tax Tour 2000, (Tax services, 2000), p. 151.

[12] Ibid., p. 783.

6) Hungary[13]

A corporation is resident for tax purposes if it is incorporated in Hungary.

7) United States[14]

A company is tax resident if it is incorporated under the laws of the US or of any of the states in the US.

2.4 The Concept of the Doctrine of Effective Management

The place of effective management test is a rule under which a corporation is considered to be a tax resident of the country in which it is controlled or managed (usually where the board of directors meets and exercises control over the affairs of the corporation).[15] The place of effective management is used to decide the tax residence in several countries. It could signify either superior management or day-to-day management. In Denmark, Netherlands and Spain it means operational or day-to-day management. New Zealand defines effective management as practical day-to-day management, irrespective of where the overriding control or superior management is exercised. Switzerland defines effective management as either the place of day-to-day activities or the place where the management decisions are taken. In Germany, the effective management denotes the overriding or superior management. In several countries, effective management is taken as the place where the board meetings are held or the directors are resident.[16]

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[13] Ibid., p. 301.

[14] Ibid., p. 152.

[15] Arnold and McIntyre, *supra* note 1, p. 166.

[16] Roy Rohatgi, Basic International Taxation, (Hague: Kluwer Law International, 2002), p. 145.

The interpretation of effective management for dual-resident corporate entities varies widely.[17] The place could be (i) where the factual and effective day-to-day management takes place, or (ii) where the top level or policymaking body makes its decisions, or (iii) where the shareholder control is situated.[18] The OECD Commentary Update 2003[19] has now defined "the place of effective management" as the place where key management and commercial decisions that are necessary for the conduct of the entity's business are in substance made. The place of effective management will ordinarily be the place where the most senior person or group of persons (for example a board of directors) makes its decisions, the place where the actions to be taken by the entity as a whole are determined; however, no definitive rule can be given and all relevant facts and circumstances must be examined to determine the place of effective management. An entity may have more than one place of management, but it can have only one place of effective management at any one time. This is according to the OECD Commentary on Model Tax Convention 2003.

Comparative Study of the Doctrine of Effective Management

1) United Kingdom[20]

U.K-incorporated companies are generally treated as U.K. resident. However, companies incorporated overseas are also treated as U.K. resident if their *central management and control* are situated in the UK. The test of control is

[17] Jean-Marc Rivier, IFA Cahiers Vol. 72A, General Report, 1987.

[18] K. Vogel, Double Taxation Conventions, Article 4, m.no. 104-106.

[19] Edwin van der Bruggen, Paul Thirakhupt and Tithiphan Chuerboonchai, Thailand's Double Taxation Agreements (Bangkok: Nititham, 2003), pp. 1447-1448.

[20] Rohatgi, *supra* note 17, pp. 151-152.

determined by whoever exercises "Superior and directing authority."[21] Control does not demand any minimum standard of active involvement, e.g. it could be passive oversight. It is the place where the de facto control is exercised. The place where the Board of Directors meets is important but not conclusive.

The UK Inland Revenue has clarified that a foreign company may become tax resident if the central or overriding management and control is deemed to be in the UK. The authorities would look at factors such as:

(1) where the highest level of control is exercised;
(2) where the actual management control is exercised (e.g. the use of shadow directors)
(3) where the directors have board meetings;
(4) where the decision-making processes and management meetings take place; or
(5) where the controlling individual/s or shareholders/s exercise their powers.[22]

2) Denmark[23]

Tax residence in Denmark is based on either incorporation or *management and control*. The latter is defined as *the actual place of day-to-day management and head office activities*. It does not depend on the place where the directors exercise the general shareholder and stewardship functions.

3) France[24]

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[21] *Union Corporation Ltd v Inland Revenue Commissioners Cases [1952] 1 ALL ER 646 (UK)*

[22] UK Statement of Practice 6/1983 now updated by SP 1/90

[23] Rohatgi, *supra* note 17, p. 148.

A company is tax resident in France if it is incorporated in France, or it has its incorporated address in France. The business must be managed and operated from the location. It is, therefore, the place where the company has its main establishment, its managerial and administrative personnel and its place of effective management. Generally, both legal and effective seats would be located in the same State.

4) South Africa[25]

A company will be resident in South Africa if it is incorporated in South Africa, or has its effective place of management in South Africa, but excluding international headquarter companies.

5) Switzerland[26]

A company is tax resident if it is (i) domiciled in Switzerland under its statues or (ii) effectively managed and controlled in Switzerland. A domestic company incorporated, organized or registered in the commercial register in Switzerland is domiciled under the tax laws. A foreign company is tax resident if it is effectively managed and controlled from within Switzerland. The place of effective management may be either the place where important decisions are taken, or the place of day-to-day management.

6) Netherlands[27]

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[24]Ibid., pp. 148-149.

[25]PricewaterhouseCoopers, *supra* note 10, p. 746.

[26] Rohatgi, *supra* note 17, p. 151.

[27] Ibid., p. 150.

The determining factor of tax residence is incorporation. A Dutch incorporated company is tax resident and it must have its seat or domicile (registered office) in the Netherlands under its statues. The Netherlands applies the real seat or "management test" for foreign companies. Their tax residence is determined "according to the circumstances." The key factor is the place where the day-to-day management meets normally, performs its management functions and takes decisions. Other factors may be used to provide supportive evidence of this place of management. They include the location of board meetings, main offices, shareholders' meetings, the currency or the place where the corporate records are kept and financial accounts prepared, etc.

Chapter 3
Resident Rule under Foreign Law

3.1 Resident Rule under the OECD Model Taxation Convention

Under the Article 7 of the OECD Model Taxation Convention, the profits of enterprise of a Contracting State shall be taxable only in that State... It is according to Resident Rule for tax purpose because the enterprise has residence in the Contracting State. So, that enterprise must pay income tax to that State. It imposes income tax from income derived from worldwide (Worldwide Income Basis) not limited to income derived from only that State (Resident Country). The income derived from other countries must be taxed also.

The Article 4 paragraph one of the OECD Model Taxation Convention provides a definition of the expression *"Resident of a Contracting State"* for the purposes of the Convention. It is that any person who, *under the laws of that State*, is liable to tax by reason of his *domicile*, *residence*, *place of management* or any other criterion of a similar nature. The definition refers to the concept of residence adopted in the domestic laws.[1] Dual tax residence can arise if (a) the same criterion leads to residence in both countries; (b) the two countries interpret the same criterion differently; or (c) the two countries use different criteria. When considering the OECD Model Taxation Convention, the meaning of the resident in Thailand must be any person who is liable to tax under the law of Thailand which is the Thai Revenue Code. It is that any enterprise incorporated under Thai law is resident in Thailand. It is considered a place of incorporation only. A place of incorporation under the Thai Revenue Code is considered where the enterprise is incorporated. If any enterprise is incorporated in Thailand, it has residence in Thailand (Thai Company). If any legal entity is incorporated in foreign country, it does not have residence in Thailand (Foreign Company).

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[1] Bruggen, Thirakhupt and Chuerboonchai, *supra* note 20, p. 1441.

The definitions of corporate tax residence under domestic tax laws in the various countries often conflict. Moreover, an overseas branch may satisfy the location of management criteria and decide the tax residence of the company. These conflicting rules lead to companies that are tax resident in more than one tax jurisdiction or not resident in any jurisdiction. The Article 4 paragraph three of the OECD Model Taxation Convention provides a tie-breaker based on the *place of effective management* for dual resident companies.[2] This paragraph is where a person other than an individual (i.e. a company or any other body of persons) is regarded as a resident of both Contracting States by the domestic law of those States. In such a case, the company or body of persons is resident for the purposes of the Convention where its *place of effective management* is situated.[3] This principle is called "Tie-Breaker Rule". It is possible if, for instance, one State attaches importance to the incorporation and the other State to the place of effective management. So, in the case of company, etc., also, special rules as to the preference must be established. It would not be an adequate solution to attach importance to a purely formal criterion like incorporation. Therefore paragraph three of Article 4 attaches importance to the place where the company, etc. is actually managed.[4] It can be considered that the place of effective management is more significant than a place of incorporation in the eyes of the OECD Model Taxation Convention. The reason is that if the place of incorporation is more significant than the place of effective management, any legal entity may be incorporated in the country having no tax or low tax for tax avoidance.

In the United Kingdom, the Inland Revenue's general view[5] is that in practice, effective management is normally found in the same place as central management and control, but this is not always the case. Determining the location of the place of effective management requires one to have regard to all relevant factors (including the

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[2] Rohatgi, *supra* note 17, p. 146.

[3] Philip Baker, Double Taxation Conventions and International Tax Law, (London: Sweet & Maxwell, 1994), p. 131.

[4] Bruggen, Thirakhupt and Chuerboonchai, *supra* note 20, pp. 1447.

[5] Inland Revenue, Tax Bulletin, December 1994, pp. 179-181.

organization of the company and the nature of its business) to establish where in substance the company is actually managed.

Further guidance as to the Inland Revenue's interpretation of *"effective management"* is contained in the *International Tax Handbook*:

"The place of effective management is generally understood to be the place where the Head office is: the Head office in the sense of—not the incorporated office—but the central directing source. The place where one would expect to find the finance director, for example, the sales director and, if there is one, the managing director. The company records would normally be found there together with the senior administrative staff...Nevertheless it is not that easy to divorce effective management from central management and control and in the vast majority of cases they will be located in the same place."[6]

Tie breaker test for companies in case of companies, generally the criteria to determine residence is the *"place of effective management"*. Place of effective management is not defined in the OECD Model Taxation Convention. However, guidance can be sought from the official commentary on the meaning of the term "place of effective management" under the Commentary on Article 4 Paragraph 24 of the OECD Commentary on Model Tax Convention 2003. The place of effective management has been adopted as the preference criterion for persons other than individuals. The place of effective management is the place where key management and commercial decisions that are necessary for the conduct of the entity's business are in substance made. The place of effective management will ordinarily be where the most senior person or group of persons (for example a board of directors) makes its decisions, the place where the actions to be taken by the entity as a whole are determined; however, no definitive rule can be given and all relevant facts and circumstances must be examined to determine the place of effective management. An

[6] Inland Revenue, International Tax Handbook, p.348.

entity may have more than one place of management, but it can have only one place of effective management at any one time[7].

3.2 Resident Rule under the United Nation Model Taxation Convention

Under Article 7 of the UN Model Taxation Convention 2001, the profits of enterprise of a Contracting State must be taxable only in that State. This is according to Residence Rule because the enterprise has residence in the Contracting State. So, that enterprise must pay income tax to that State. It is imposed income tax from income derived from worldwide (Worldwide Income Basis) not limited to income derived from only that State (Resident Country). So, the Residence Rule is applied in the UN Model Taxation Convention. This Article is the same as the Article 7 of the OECD Model Taxation Convention.

Under the Article 4 of the UN Model Taxation Convention, it give the definition of the term "Resident of a Contracting State" which means that any person who, *under the laws of that State*, is liable to tax by reason of his *domicile, residence, place of incorporation, place of management* or any other criterion of a similar nature. This definition is the same as the definition of the term "Resident of a Contracting State" in the OECD Model Taxation Convention. Therefore, resident of Thailand means that any person who is liable to tax under the laws of Thailand. It is that any enterprise incorporated under Thai law has residence in Thailand. It is considered a place of incorporation only to be resident of Thailand under the Thai Revenue Code. A place of incorporation under the Thai Revenue Code is considered where the enterprise is incorporated. If any enterprise is incorporated in Thailand, it has residence in Thailand (Thai Company). If any legal entity is incorporated in foreign country, it does not have residence in Thailand (Foreign Company).

Under Article 4 paragraph three of the UN Model Taxation Convention, there is Tie-Breaker Rule like the OECD Model Taxation Convention. It is that a person other

[7] Bruggen, Thirakhupt and Chuerboonchai, *supra* note 20, pp. 1447-1448.

than an individual is a resident of both Contracting States, and then it must be deemed to be a resident only of the State in which its *place of effective management* is situated. It can be inferred that the place of effective management is the most important than others i.e. a place of incorporation in the eyes of the UN Model Taxation Convention.

For example:

If Company X is incorporated in Country A but it has an effective management in Country B, Company X will have a residence in Country B which is a place of effective management not Country A under the Article 4 paragraph three of the UN Model Taxation Convention.

When considering the Tie-Breaker Rule under the OECD Model Taxation Convention and the UN Model Taxation Convention, A place of effective management is the most significant in the eyes of both Model Taxation Conventions.

3.3 Resident Rule under the United Kingdom Law and under the EU Directive

Resident Rule under the United Kingdom Law

"Company Residence"

Residence has always been a material factor for companies in determining tax liability. But statue law has never laid down comprehensive rules for determining where a company is resident and until 1988 the question was left solely to the Courts to decide. Section 66 of the Finance Act 1988 introduced the rule that a company incorporated in the UK is resident there for the purposes of the Taxes Acts. Case law still applies in determining the residence of companies excepted from the incorporation rule or which are not incorporated in the UK.[8]

The definition whether a company is regarded as being resident in the United Kingdom for corporation tax purposes is dependent on satisfying two tests, these are:

1) A company that is incorporated in the United Kingdom will automatically be resident in the United Kingdom, as per Section 66 of the Finance Act 1988[9], even if its centre of management and control is outside the UK[10]. Thus, the place of incorporation of a company is merely a factor in determining its residence[11].
2) A company is resident in the United Kingdom if the central management and control are exercised in the United Kingdom, as per case law established in *De Beers Consolidated Mines Ltd. v. Howe (1906)* and guidance from SP 1/90. (Central management and control is the "highest level of control", as per guidance provided by SP 1/90 and case law.[12])

The common law rule for determining the residence of a company is authoritatively expressed in *De Beers Consolidated Mines Ltd. V Howe (1906) AC 455* by the Lord Loreburn. Lord Loreburn expressed the test of corporate residence which is that in applying the concept of residence to a company, it should proceed as nearly on an analogy of an individual. A company cannot eat or sleep, but it can keep house and do

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[8] In http://www.hmrc.gov.uk/manuals/intmanual/INTM120140.htm, Access date May 30, 2005.

[9] RSM Robson Rhodes, Investment Trust Status: A Summary of the Rules (UK: August 2002), p. 9.

[10] Adrian Shipwright and Jeffrey W. Price, UK Taxation and Intellectual Property (Oxford: ESC Publishing), p. 24.

[11] Ibid., p. 25.

[12] Ibid., p. 10.

business. Therefore, it should be seen where it really keeps house and does business. An individual may have foreign nationality, and yet reside in the United Kingdom. So may a company.

The decision of Kelly CB and Huddleston B in *Calcutta Jute Mills v Nicholson and Cesena Sulphur Company v Nicholson (1876) 1 Ex D 428* involved the principle that a company resides for purposes of income tax where its real business is carried on. Those decisions have been acted upon ever since. "I regard that as a general rule, and the real business is carried on where the central management and control actually abides"[13]. This is a pure question of fact to be determined, not according to the construction of this or that regulation or ruling, but on a scrutiny of the course of business and trading.[14] The 'central management and control' test, as set out in *De Beers*, has been endorsed by a series of subsequent decisions. In particular, it was described by Lord Radcliffe in the 1959 case of *Bullock v Unit Construction Company 38 TC 712* 'as precise and unequivocal as a positive statutory injunction… I do not know of any other test which has either been substituted for that of central management and control, or has been defined with sufficient precision to be regarded as an acceptable alternative to it. To me… it seems impossible to read Lord Loreburn's words without seeing that he regarded the formula he was propounding as constituting the test of residence.' Nothing which has happened since has in any way altered this basic principle: under current UK case law a company is regarded as resident for tax purposes where central management and control is to be found.[15]

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[13] Shipwright and Price, *supra* note 38, p. 25.

[14] In http://www.hmrc.gov.uk/manuals/intmanual/INTM120140.htm, Access date May 30, 2005.

[15] Shipwright and Price, *supra* note 38, p. 65.

Place of 'central management and control'[16]

In determining whether or not an individual company outside the scope of the incorporation test is resident in the UK, it thus becomes necessary to locate its place of 'central management and control'. The case law concept of central management and control is, in broad terms, directed at the highest level of control of the business of a company. It is to be distinguished from the place where the main operations of a business are to be found, though those two places may often coincide. Moreover, the exercise of control does not necessarily demand any minimum standard of active involvement: it may, inappropriate circumstances, be exercised tacitly through passive oversight.

Successive decided cases have emphasized that the place of central management and control is all question of fact. For example, Lord Radcliffe in *Unit Construction* said that 'the question where control and management abide must be treated as one of fact or 'actuality''. It follows that factors which together are decisive in one instance may individually carry little weight in another. Nevertheless the decided cases do give some pointers. In particular a series of decisions has attached importance to the place where the company's board of directors meets. There are very many cases in which the board meets in the same country as that in which the business operations take place, and central management and control is clearly located in that one place. In other cases central management and control may be exercised by directors in one country though the actual business operations may, perhaps under the immediate management of local directors, take place elsewhere.

But the location of board meetings, although important in the normal case, is not necessarily conclusive. Lord Radcliffe in *Unit Construction* pointed out that the site of the meetings of the directors' board had not been chosen as 'the test' of company residence. In some cases, for example, central management and control is exercised by a single individual. This may happen when a chairman or managing director

[16]Shipwright and Price, *supra* note 38, pp. 65-67.

exercises powers formally conferred by the company's Articles and the other board members are little more than ciphers, or by reason of a dominant shareholding or for some other reason. In those cases the residence of the company is where the controlling individual exercises his powers.

In general the place of directors' meetings is significant only in so far as those meetings constitute the medium through which central management and control is exercised. If, for example, the directors of a company were engaged together actively in the UK in the complete running of a business which was wholly in the UK, the company would not be regarded as resident outside the UK merely because the directors held formal meetings outside the UK. While it is possible to identify extreme situations in which central management and control plainly is, or is not, exercised by directors in formal meetings, the conclusion in any case is wholly one of fact depending on the relative weight to be given to various factors. Any attempt to lay down rigid guidelines would only be misleading.

Generally, however, where doubts arise about a particular company's residence status, the Inland Revenue adopts the following approach[17]:

1) They first try to ascertain whether the directors of the company in fact exercise central management and control.
2) If so, they seek to determine where the directors exercise this central management and control (which is not necessarily where they meet).
3) In cases where the directors apparently do not exercise central management and control of the company, the Revenue then look to establish where and by whom it is exercised.

Conclusion

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[17] Statement of Practice 1/90: PP. 3-4. In http://www.hmrc.gov.uk/manuals/intmanual/INTM120140.htm, Access date June 1, 2005.

1) Subject to s66(1) FA 1988, the place of incorporation of a company is merely a factor in determining its residence;
2) A company which is not incorporated in the UK may nevertheless be resident there if its central management and control exists there: *De Beers Consolidated Mines Ltd v Howe* [1906] AC 455.
3) That place of central management is not where the directors are resident: *John Hood and Co Ltd v Magee (1918) 7 TC 327.* Thus if the directors carry on the administration of the company from Jersey and hold all board meetings there, the fact that they fly over from the UK to do so each time will not prevent the company, being resident in Jersey and not in the UK. Historically the main test of where the place of central management of a company was located was where the company's Board of Directors met. With greater ease of transport and communication, this is no longer considered an effective test on its own merits. One now has to look at where the real decisions as to the operation of the company are taken on a day-to-day basis—i.e. the place of effective management.
4) As *De Beers* said, it is the place where the central management is actually carried on and not the place where it ought to be carried on which is vital: see *Unit Construction Co Ltd v Bullock (1959) 38 TC 712*, where, contrary to the rules contained in the Articles of Association, the central management of a Kenyan company's affairs was carried on in the UK by the parent company and not by the Kenyan Board of Directors. Accordingly, the company was resident in the UK.
5) Factors which are usually irrelevant are:
    (1) the place where the company trades;
    (2) the residence of the shareholders;
    (3) the country of incorporation (as opposed to incorporation) of the company.
6) It is possible for a company to be resident in more than one place.

7) The centre of management and control test applies both to UK and non-UK-incorporated companies.[18]
8) The same tests apply for subsidiaries as for parent companies.[19] The key indicator of residence remains the location of the superior and directing authority.[20]
9) Shareholder control does not in general matter in determining the residence of a company.[21]
10) Effective control for a local board does not guarantee non-UK residence.[22]

Resident Rule under the EU Directive

One of the Directives of the European Economic Community related to the doctrine of effective management is the Parent-Subsidiary Directive 90/435/EEC of 23 July 1990. It is related to the parent companies and their subsidiaries in the European Union. The Parent Subsidiary Directive (Directive 90/435/EEC) intends to harmonize the tax treatment of dividends distributed from subsidiary to parent within the EU. It was designed to eliminate tax obstacles in the area of profit distribution between groups of companies in the EU by:

1) abolishing withholding taxes on payment of dividends between associated companies of different Member States and
2) preventing double taxation of parent companies on the profits of their subsidiaries.[23]

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[18] *Todd v Egyptian Delta Land and Investment limited [1929] AC 1.*

[19] *Bullock v Unit Construction [1960] AC 251.*

[20] *Union Corporation v IRC [1952] 1 All ER 646.*

[21] *Kodak Limited v Clarke (1903) 4 TC 549.*

[22] *Swedish Central Railways v Thompson [1925] AC 495.*

[23] In http://europa.eu.int/comm./taxation_customs/taxation/company-tax/parents-subsidiary_directive/index_en.htm, Access date June 25, 2005.

Under the Parent Subsidiary Directive dividends distributed from subsidiary to parent within the EU are exempt (or entitled to credit for tax already paid).[24]

On 22 December 2003, the Council adopted Directive 2003/123/EC to broaden the scope and improve the operation of the Council Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

The new Directive, based on a Commission proposal of 8th September 2003, contains three main elements:

1) updating the list of companies that the Directive covers;
2) relaxing the condition for exempting dividends from withholding tax (reduction of the participation threshold); and
3) eliminating double taxation for subsidiaries of subsidiary companies.[25]

In relaxing the condition for exempting dividends from withholding tax, currently, certain dividends paid by a subsidiary company to its parent company are exempted from withholding tax. This is also the case where the two companies are located in different member States.

In eliminating double taxation for subsidiaries of subsidiary companies, the new Directive renders more complete the mechanism for the elimination of double taxation of dividends received by a parent company located in one Member States from its subsidiary located in another.

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[24] In http://www.Euro.fee.be/Other Pubs/expenses.pdf, Access date June 25, 2005.

[25] In http://europa.eu.int/comm./taxation_customs/taxation/company-tax/parents-subsidiary_directive/index_en.htm, Access date June 25, 2005.

At present, since a subsidiary company is taxed on the profits out of which it pays dividends, the Member State of the parent company must either:

1) Exempt profits distributed by the subsidiary from any taxation or
2) Impute the tax already paid in the Member State of the subsidiary against its own tax.

The new Directive deals with imputing tax paid by subsidiaries of these direct subsidiary companies. Member State must impute against the tax payable by the parent company any tax on profits paid by successive subsidiaries downstream of the direct subsidiary. This ensures that the objective of eliminating double taxation is better achieved.

From this Parent Subsidiary Directive, it can be found that the doctrine of effective management is applied in this Directive. It is because a parent company is the shareholders of the subsidiaries so the parent company has the central management and control on its subsidiaries. Therefore, this Directive is provided the Member State of the parent company must either exempt profits distributed by the subsidiary from any taxation or imputes the tax already paid in the Member State of the subsidiary against its own tax.

Chapter 4
Analysis of the Problems on Collecting Tax from Residence Rule

4.1 Analysis the interpretation of corporate residence of Thailand under the Thai Revenue Code

Under Section 39 of the Thai Revenue Code, "juristic company or partnership" means the juristic company or partnership which *is organized under the Thai law* or which *is organized under foreign laws...*

Under Section 65 and Section 66 of the Thai Revenue Code, All juristic companies or partnerships which *are organized under the Thai law* or which *are organized under foreign laws* but carry on business in Thailand shall be pay tax under the provisions of this Division. This is according to Residence Rule. According to residence rule in Thailand, any legal entity having residence in Thailand must pay corporate income tax from worldwide income.

The meaning of the word "organized under the Thai Law" and "organized under the foreign laws" under Section 39 and Section 66 of the Thai Revenue Code, the word "organized under the Thai Law" and "organized under the foreign laws" is used to interpret directly and indirectly in many Tax Rulings of the Revenue Department of Thailand and in the Supreme Court decisions also.

For example:

1) According to the Tax Ruling No. KorKor 0811/5210[1], Company P Inc. is *incorporated* under the law of the U.S. so it is deemed to have *residence* in the U.S.A.

[1] In http://www.rd.go.th/publish/24990.0.html, Access date June 21, 2005.

2) According to the Tax Ruling No. KorKor 0706/3996[2], Company is incorporated under the law of Thailand so the company has the duty to pay corporate income tax from the net profit under Section 65 of the Thai Revenue Code.

3) According to the Tax Ruling No. KorKor 0811/15563[3], Company B (Hong Kong) is the company incorporated under the law of Hong Kong and having Company A as the agent in order to find the customers in Thailand for leasing machine and selling goods of Company B (Hong Kong) so in this case Company B is deemed to do business in Thailand under Section 76 bis of the Thai Revenue Code. Therefore, this ruling intepreted the word "organized under the foreign laws" indirectly that company organized under the foreign law means the company incorporated under the foreign law.

4) According to the Tax Ruling No. KorKor 0706/8706[4], Company A incorporated under the law of the United Kingdom and not doing business in Thailand but it received the income paid from Thailand so it must have the duty to pay corporate income tax in Thailand under Section 70 of the Thai Revenue Code. Therefore, this ruling intepreted the word "organized under the foreign laws" indirectly that company organized under the foreign law means the company incorporated under the foreign law.

5) According to the Supreme Court Decision No. 3676/28[5], the plantiff is the subsidiary in Thailand of the Chestermanhattan Bank incorporated under the law of the United States of America so the Chestermanhattan Bank is organized under the foreign law.

Therefore, the meaning of the word "organized under the Thai Law" and "organized under the foreign laws" under Section 39 and Section 66 of the Thai Revenue Code is

[2] In http://www.rd.go.th/publish/24763.0.html, Access date June 21, 2005.

[3] In http://www.rd.go.th/publish/23256.0.html, Access date June 21, 2005.

[4] In http://www.rd.go.th/publish/23256.0.html, Access date June 21, 2005.

[5] In http://www.rd.go.th/publish/23256.0.html, Access date June 21, 2005.

that the company "incorporated under the Thai Law" and the company "incorporated under the foreign laws". All companies incorporated under the Thai law must pay corporate income tax from net profit of all their businesses derived from all over the world not derived from Thailand only (Worldwide Income Basis). If any legal entity is not incorporated in Thailand, it must not pay corporate income tax from net profit calculated from the income derived from all over the world under the Thai Revenue Code but it must pay corporate income tax from net profit calculated from income derived in Thailand only. Residence rule is applied for imposing corporate income tax from the company incorporated under Thai law according to the Thai Revenue Code. Under Thai law, any legal entity incorporated under Thai law is deemed to be a resident of Thailand. It is according to the Civil and Commercial Code.[6]

When considering the cases occured in Thailand according to the Tax Rulings of the Revenue Department and the Supreme Court Decisions mentioned above, any problem about the inefficiency of using the doctrine of incorporation in the Thai Law can be not occurred. There are many problems occurred in the United Kingdom and other countries. The reason is that corporate residence under Thai law is considered a place of incorporation only but at the present time corporate residence is considered a place of effective management to be substantial in the most countries in the world. Under the Thai Revenue Code, any legal entity incorporated under Thai law is deemed to be resident of Thailand. "Any legal entity incorporated under Thai law" means the legal entity incorporated in Thailand regardless a place of effective management. If any legal entity is not incorporated in Thailand, the legal entity is not resident of Thailand under the Thai Revenue Code.

In the United Kingdom, there are many cases occurred. The two earliest U.K. decisions *Calcutta Jute Mills Co. Ltd v. Nicholson (1876) 1 TC 83* and *Cesena Sulphur Co. Ltd v. Nicholson (1876) 1 TC 88* established that a company is resident where its centre of control is located. These two cases were factually similar, concerning enterprises incorporated in the United Kingdom, but having their entire

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[6] Kateruang, *supra* note 5, p. 63.

operations situated in India and Italy respectively. Each company had executive directors at the site of the foreign operations, but a majority of directors to whom reports were regularly made resided in London. The court held that "in each case, although the actual business of the company was abroad, it was under the control and disposition of a person (the company) whose governing body was in the United Kingdom, and it was therefore resident in the United Kingdom and liable to tax there.[7]"

It was made clear that "the decisions were not based on the fact that the companies were formed in the United Kingdom, but that the real control, in the sense of the investment decisions, took place in London." This was confirmed by the House of Lords decision in the De Beers case *(De Beers Consolidated Mines Ltd. v Howe (1906))*. De Beers was a company formed under South African law; not only that, but the head office and all the mining activities of the company were at Kimberley, and the general meetings held there. Nevertheless, the directors meetings in London are the meetings where the real control is always exercised in practically all the important business of the company except the mining operations. So, although the company was not an English person, it was resident in the United Kingdom and liable to tax on its entire income wherever earned.[8]

When considering the *De Beers case* in the United Kingdom, the fact like the *De Beers case* can be occurred in Thailand.

For example:

Company X is incorporated in Singapore but the board of directors' meetings for investment decisions is in Thailand. Under the Thai Law, Company X is resident of Singapore because a place of incorporation is in Singapore. Despite, the central

[7] Sol Picciotto, International Business Taxation (London: Weidenfeld and Nicolson, 1992), p. 6.

[8] Ibid.

management and control (effective management) is in Thailand. Thai Government cannot impose corporate income tax from worldwide income of Company X according to Residence Rule because it is not resident of Thailand.

The result of this example is different from the *De Beers case* in the U.K. The reason is that the definition of a resident company in the United Kingdom is different from the definition resident company in Thailand.

The definition whether a company is resident of the United Kingdom for corporation tax purposes depends on satisfying two tests, these are[9]:

1) A company that is incorporated in the United Kingdom will automatically be resident in the United Kingdom,
2) A company is resident in the United Kingdom if the central management and control are exercised in the United Kingdom, as per case law established in *De Beers Consolidated Mines Ltd. v. Howe (1906)* and guidance from SP 1/90.[10]

But the definition whether a company is resident of Thailand for corporation tax purposes depends on a place of incorporation only. If a company is incorporated in Thailand, it is resident in Thailand. A place of central management and control (place of effective management) is not pertinent under the Thai law.

When considering the example, Company X is deemed to have effective management in Thailand because the board of directors' meetings for investment decisions is in Thailand. However, a place of effective management is not pertinent under the Thai law at all. Even though a place of effective management is in Thailand, a place of incorporation is not in Thailand. The company is not resident of Thailand. Therefore, Thai Government cannot impose corporate income tax from worldwide income of Company X in spite of having effective management in Thailand.

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[9] Investment Trust Status: A Summary of the Rules, *supra* note 37, p. 9.

[10] Ibid., p. 10.

When comparing with the *De Beers case*, the U.K. Government can impose corporate income tax from worldwide income of De Beers Company according to Resident Rule even though it is incorporated in South Africa because the definition of a resident company under the United Kingdom law for corporation tax purposes is not only a company incorporated in the United Kingdom but also includes a company has central management and control exercised in the United Kingdom. Therefore, De Beers Company is resident of the U.K. even though it is incorporated outside the UK. It can be found that the U.K. Government is more efficient in imposing corporate income tax than the Thai Government.

The reason that the definition whether a company is resident of the United Kingdom for corporation tax purposes is not only a company is incorporated in the United Kingdom but also includes a company has central management and control exercised in the United Kingdom is expressed in *De Beers Consolidated Mines Ltd. V Howe (1906) AC 455* by the Lord Loreburn. Lord Loreburn expressed the test of corporate residence which is that in applying the concept of residence to a company, it should proceed as nearly on an analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. Therefore, it should be seen where it really keeps house and does business. An individual may have foreign nationality, and yet reside in the United Kingdom. So may a company. Otherwise it might have its chief seat of management and its centre of trading in England under the protection of English law, and yet escape the appropriate taxation by the simple expedient of being incorporated abroad and distributing its dividends abroad. A company resides for purposes of income tax where its real business is carried on and the real business is carried on where the central management and control actually abides. This is a pure question of fact to be determined, not according to the construction of this or that regulation or ruling, but on a scrutiny of the course of business and trading.[11]

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[11] In http://www.hmrc.gov.uk/manuals/intmanual/INTM120140.htm, Access date June 1, 2005.

Further, in the U.K. case, *Bullock v. Unit Construction Co. (1959)*, East African subsidiaries were held to be managed and controlled by their parent company in London and therefore resident in the U.K., even though this was contrary to their articles of association.[12]

When considering the *Bullock case* in the United Kingdom, the fact like the Bullock case can be occurred in Thailand.

For example:

Company Z is a parent company incorporated in Thailand. It has subsidiaries in other countries. Company Z's subsidiaries are managed and controlled by Company Z in Thailand because the group of shareholders of Company Z is the same as the group of shareholders of Company Z's subsidiaries and the controlling board of directors exercised its powers in Thailand. Under the Thai Revenue Code, corporate residence is considered where the company is incorporated. Therefore, Company Z's subsidiaries are foreign company under the Thai Revenue Code because their subsidiaries are not incorporated in Thailand but incorporated in other countries. So, Thai Government cannot impose corporate income tax from worldwide income of Company Z's subsidiaries according to residence rule under Thai law because their subsidiaries are not resident in Thailand. The reason is that a place of incorporation only is considered under the Thai law.

From this example, Company Z's subsidiaries are managed and controlled by their parent company in Thailand and the controlling board of directors exercised its powers in Thailand. It means that the place of central management and control (place of effective management) is in Thailand. However, a place of effective management is not pertinent under the Thai law. Even though a place of effective management is in Thailand, a place of incorporation is not in Thailand. The company is not resident of Thailand because the Thai law is considered a place of incorporation only, not

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[12] Sol Picciotto, *supra* note 60, p. 6.

including a place of effective management. Therefore, Thai Government cannot impose corporate income tax from worldwide income of Company Z's subsidiaries in spite of having effective management in Thailand.

When comparing with the Bullock case, the U.K. Government can impose corporate income tax from worldwide income of East African subsidiaries according to Resident Rule even though it is incorporated in East Africa because the definition whether a company is regarded as being resident in the United Kingdom for corporation tax purposes is not only a company is incorporated in the United Kingdom but also includes a company has central management and control exercised in the United Kingdom. In the Bullock case, East African subsidiaries were managed and controlled by their parent company in London which means the place of effective management is in the U.K. Therefore, it is resident in the U.K. even though it is incorporated outside the U.K.

From the example, it can be found that the U.K. Government is more efficient in imposing corporate income tax than the Thai Government because the Thai Government cannot impose corporate income tax from worldwide income of the subsidiaries not incorporated in Thailand but having effective management in Thailand but the U.K. Government can.

In the *Bullock case*, it can be compared with the case occurred in Thailand i.e. C.P. Public Limited Company is a parent company incorporated in Thailand having its subsidiaries in other countries. Its subsidiaries are deemed to be resident in foreign countries because they are incorporated in foreign countries under the Thai law. Thai Government cannot also impose corporate income tax from worldwide income of its subsidiaries according to residence rule. Despite, the controlling board of directors of its subsidiaries exercises its powers in Thailand which is the place of effective management.

From the examples, it can be considered that using a place of effective management together with a place of incorporation as corporate residence is more efficient than using a place of incorporation only because corporate income tax can be imposed from worldwide income of the company not incorporated in Thailand but having effective management in Thailand by using a place of effective management as corporate residence. But it cannot be imposed from worldwide income in case of using a place of incorporation only as corporate residence.

In using the place of incorporation in determining corporate residence according to Thai Revenue Code, the investors may make decision to incorporate a company in the territory that has no tax at all or low tax which is "Tax Haven". Tax Haven is a jurisdiction actively making itself available for the avoidance of tax which would otherwise be paid in relatively high tax countries.[13] It is the case that using territory of one country to avoid tax of another country. It is because imposing international tax is not fair or is too high. The multi-national enterprises try to find the way to avoid tax to reduce capital of business in order to have high profit and pay low tax legally.[14]

For example:

The investors move the residence from one country to the tax haven that has low tax or no tax, such as; incorporate to be a company in the Cayman Island.

Delaware is the State of the United States of America. It has a reputation as a corporate haven. For companies doing business outside of Delaware, there is no corporate income tax.[15] Section 1902[16] of the Delaware Code provides that a

[13] Panit Dhirapharbwongse, Principles of International Tax Planning for Multinational Companies, (Bangkok, 2003), p. 72.

[14] Supatra Anantapong, "Tax Avoidance of Multinational Corporations", Taxation Document 269 (Febuary 2004): 105.

[15] PP. 5-6. In http://www.offshoresimple.com/delaware.htm, Access date May 31, 2005.

[16] Delaware Code Annotated Revised 1974 Title 30.

corporation maintaining a statutory corporate office in the State but not doing business within the State shall be exempt from corporate income tax. The investors may make decision to incorporate a company in Delaware instead of Thailand because they would like to avoid corporate income tax in Thailand which has to pay from worldwide income. Under the Thai Revenue Code, the place of incorporation is applied in determining corporate residence. The company incorporated in Delaware is deemed to be a resident in Delaware under the Thai Revenue Code, not resident in Thailand even though this company has an effective management in Thailand, for instance, board of directors' meetings in Thailand. It is because the Thai Revenue Code uses only the place of incorporation to determine the corporate residence of Thailand, not considering the place of effective management at all.

4.2 Analysis the interpretation of corporate residence of Thailand under the Double Tax Treaty between Thailand and other countries

The Definition of Residence Rule under Double Tax Treaty between Thailand and Other Countries

1) Double Tax Treaty between Thailand and the United States of America

Under the Double Tax Treaty between Thailand and the United States of America, the meaning of "resident of the Contracting States" is that any person who, *under the laws of that State*, is liable to tax by reason of his *domicile, residence, citizenship, place of management, place of incorporation*, or any other criterion of a similar nature.

The term "Resident" in case of legal entity generally means that if any legal entity is incorporated under laws of any country, that legal entity is deemed to have resident of that country. However, regarding as having resident may rely on other ways under the laws of United States of America as follows[17]:

(1) A place of Management
(2) A place of Head Office
(3) Nationality of the Legal Entity
(4) A place incurred major income
(5) Residence or Domicile of majority shareholders
(6) Residence or Domicile of the Board of Directors

2) Double Tax Treaty between Thailand and the United Kingdom of Great Britain and Northern Ireland

Under the Double Tax Treaty between Thailand and the United Kingdom of Great Britain and Northern Ireland, the meaning of "resident of a Contracting State" is that any person who, *under the law of that State*, is liable to taxation by reason of his *domicile*, *residence*, *place of management, place of incorporation*, or any other criterion of a similar nature.

Article 4 of the Double Tax Agreement between Thailand and other countries is interpreted the term "resident of the Contracting State" for legal entity to be that any person who, under the law of Thailand is liable to pay tax. The definition refers to the concept of residence adopted in the domestic laws.[18] Thai law attaches importance to the place of incorporation in determining the residence. Under Thai law, a legal entity is deemed to be a resident of Thailand if that legal entity is incorporated in Thailand according to the Civil and Commercial Code. But if a place of

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[17] Walaisathearn, *supra* note 6, p. 47.

[18] Bruggen, Thirakhupt and Chuerboonchai, *supra* note 20, pp. 1441.

incorporation is in foreign country, the legal entity is resident of foreign country, not Thailand.

However, when considering the Double Tax Treaty between Thailand and other countries, for instance, the Double Tax Treaty between Thailand and the United Kingdom, resident of the Contracting State under the UK law, is any person under the law of the United Kingdom which is considered a place of incorporation or a place of effective management. Therefore it is found that the interpretation of resident under the law of UK is more flexible than the interpretation of resident under the Thai Revenue Code.

According to Thai law and the Double Tax Treaties between Thailand and other countries about interpretation of resident of the Contracting State under the laws of Thailand, the place of incorporation only is applied. The interpretation of this term under Thai law is so narrow. It affects to the Thai Government can not impose tax wholly. Many countries in the world are applied the place of incorporation together with the place of effective management to determine the corporate residence. The interpretation of those countries is more widely than the interpretation under the Thai law. It affects their Government to be able to impose tax wholly. It is because perhaps the company is not incorporated in a country but it has effective management in that country. When using both the place of incorporation and the place of effective management, if a company is not incorporated in a country but it has an effective management in that country that company can be imposed tax by its Government.

For example:

Under the Double Tax Treaty between Thailand and the United Stated of America, the meaning of "resident of the Contracting States" is that any person who, *under the laws of that State*, is liable to pay tax by reason of his *domicile*, *residence*, *citizenship*, *place of management*, *place of incorporation*, or any other criterion of a similar nature. Hence, the resident company of Thailand is the company under the law of Thailand is liable to tax by the reason of place of incorporation only according to the Thai Revenue Code. If Company A is incorporated in the United States of America but it has an effective management in Thailand, under the Thai Revenue Code Company A is a resident of the United States of America, not resident of Thailand. It is because the meaning of resident of Thailand is according to the Thai Revenue Code which considers the place of incorporation only, not including the place of effective management. Thus, Company A is not the resident of Thailand. It affects to the Thai Government not to be able to impose tax from worldwide income of Company A.

Thus, if the Thai Revenue Code still has the interpretation of the term "resident company" to be too narrow like this, the Thai Government can not impose tax wholly. And this interpretation affects to the Double Tax Treaty between Thailand and other countries also. It is because the definition of the term "resident of the Contracting State" under the Double Tax Treaty between Thailand and other countries is according to the law of Thailand which is the Thai Revenue Code. It means that if the Thai Revenue Code has the interpretation of the resident company by considering only the place of incorporation, the company incorporated in Thailand only must be imposed tax but the company incorporated outside Thailand but it has an effective management in Thailand must not be impose tax by the Thai Government. It is the loophole of the Thai Revenue Code that affects to the Double Tax Treaty between Thailand and other countries. The interpretation of the resident company under the Thai Revenue Code should be amended rapidly in order that the Thai Government can impose tax wholly from the company incorporated in Thailand and the company not incorporated in Thailand but having effective management in Thailand.

Chapter 5
Conclusion and Recommendation

5.1 Conclusion

The tax law and practices of the country where a company is established or carries on its business govern its tax residence. It is generally decided by either (i) the place of incorporation or legal seat, or (ii) the location of management or real seat.

In the former case, the status is determined by the country of incorporation, or where its legal or statutory seat ("incorporated address or office") is located under the country's civil or commercial law. Generally, the legal or statutory seat is also the country of incorporation. However, the statutory seat may or may not be at the same place as the real or effective seat, i.e. the location of management or the place where the central administration is located. Since a company can be incorporated and have its legal seat abroad, and still be effectively managed in the country, several jurisdictions use both the criteria. Some countries also apply multiple tests.

The place of effective management is used to decide the tax residence in several countries. It could signify either superior management or day-to-day management.[1] The term "effective management" is now defined under the OECD Commentary Update 2003.[2] It is "the place where key management and commercial decisions that are necessary for the conduct of the entity's business are in substance made." The place of effective management will ordinarily be the place where the most senior person or group of persons (for example a board of directors) makes its decisions, the place where the actions to be taken by the entity as a whole are determined; however, no definitive rule can be given and all relevant facts and circumstances must be examined to determine the place of effective management. An entity may have more

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[1] Rohatgi, *supra* note 17, p. 145.

[2] Bruggen, Thirakhupt and Chuerboonchai, *supra* note 20, pp. 1447-1448.

than one place of management, but it can have only one place of effective management at any one time.

Using the place of incorporation only in determining the corporate residence is the loophole of the Thai Revenue Code and it can affect to the Double Tax Treaty between Thailand and other countries also. It is because the interpretation of the resident of the Contracting States under the Double Tax Treaty between Thailand and other countries is according to the law of Thailand which is the Thai Revenue Code.

The enforcement and interpretation of the term "resident company" of the Thai Revenue Code and the Double Tax Treaty between Thailand and other Countries by considering a place of incorporation only is inefficient. Thai Government can not impose corporate income tax effectively from worldwide income of the company not incorporated in Thailand but having effective management in Thailand because the company is not resident in Thailand under the interpretation of the term "resident company" of the Thai Revenue Code which considers only the place of incorporation, not including the place of effective management. Besides, it causes tax avoidance.

5.2 Recommendation

From the potential problems mentioned above, it should be improved by considering a place of effective management together with the place of incorporation because it is more effective than considering a place of incorporation only. The Thai Revenue Department can impose tax more effectively than using only the place of incorporation. Using only the place of incorporation makes the Thai Revenue Department impose tax less than as it should be. Moreover, considering the place of effective management is the international practice. It can be considered from the OECD Model Taxation Convention and in the UN Model Taxation Convention. The doctrine of effective management is also applied in these models. Hence, it should be improved by modification of the Thai Revenue Code or by interpretation of the Thai Revenue by using the doctrine of incorporation together with the doctrine of effective management.

The Thai Government should amend the provisions of the Thai Revenue Code by giving the definition whether a company is regarded as being resident in Thailand for corporation tax purposes to be that: (a) A company that is incorporated in Thailand will automatically be resident in Thailand or (b) A company is resident in Thailand if its central management and control are exercised in Thailand.

Hence, Section 39 of the Revenue Code should have the meaning of the term "Resident Company" as follows:

Section 39 of the Revenue Code:

"Resident Company" means
(a) A company is incorporated in Thailand or
(b) A company has its central management and control in Thailand.

Moreover, Section 66, Section 76 bis and Section 70 should be amended to be as follows:

Section 66 of the Revenue Code provides that:

"All juristic companies or partnerships which *are organized under the Thai law or which are organized under the foreign laws* but carry on business in Thailand shall pay tax under the provisions of this Division.

The juristic companies or partnerships which *are organized under foreign laws* and carrying on business in various countries including Thailand shall pay tax on the net profits arising from or in consequence of the business carried on in Thailand during an accounting period..."

It should be amended to be that:

"All juristic companies or partnerships which are *resident* or which are *non-resident* but carry on business in Thailand shall pay tax under the provisions of this Division. The juristic companies or partnerships which are *non-resident* and carrying on business in various countries including Thailand shall pay tax on the net profits arising from or in consequence of the business carried on in Thailand during an accounting period..."

Section 76 bis of the Revenue Code provides that:

"If *a juristic company or partnership organized under a foreign law* has an employee, a representative or a go-between to carry on business in Thailand and thereby derives income or gains in Thailand, such a juristic company and partnerships shall be deemed carrying on business in Thailand, and such employees, representatives or go-betweens, whether a natural or juristic persons, shall, in so far as the said income or gains are concerned, be deemed to be *the agent of the said juristic company or partnership* and shall have the duty and liability to file a return and pay tax under the provisions of this Division..."

It should be amended to be that:

"If *a non-resident juristic company or partnership* has an employee, a representative or a go-between to carry on business in Thailand and thereby derives income or gains in Thailand, such a juristic company and partnerships shall be deemed carrying on business in Thailand, and such employees, representatives or go-betweens, whether a natural or juristic persons, shall, in so far as the said income or gains are concerned, be deemed to be *the agent of the non-resident juristic company or partnership* and shall have the duty and liability to file a return and pay tax under the provisions of this Division..."

Section 70 of the Revenue Code provides that:

"*A juristic company or partnership organized under a foreign law and not carrying on business in Thailand* which has received assessable income under Section 40(2), (3), (4), (5) or (6) which is paid either from or in Thailand shall pay tax. The payer of the assessable income shall deduct the tax from the income at the income tax rate for juristic companies and partnerships, and shall remit the tax and at the same time file a return in the form prescribed by the Director-General to the local Amphur within seven days from the last date of the month in which the payment is made. In this connection, the provisions of Section 54 shall apply mutatis mutandis.

The provisions of the first paragraph shall not apply in the case where *a juristic company or partnership incorporated under a foreign law* receives assessable income in the nature of interest paid by the Government or by, a financial institution organized by a specific law of Thailand for the purpose of lending money to promote agriculture, commerce, or industry."

It should be amended to be that:

"A *non-resident juristic company or partnership under Section 66 paragraph two or under Section 76 bis* which has received assessable income under Section 40(2), (3), (4), (5) or (6) which is paid either from or in Thailand shall pay tax. The payer of the assessable income shall deduct the tax from the income at the income tax rate for juristic companies and partnerships, and shall remit the tax and at the same time file a return in the form prescribed by the Director-General to the local Amphur within seven days from the last date of the month in which the payment is made. In this connection, the provisions of Section 54 shall apply mutatis mutandis.

The provisions of the first paragraph shall not apply in the case where *a non-resident juristic company or partnership* receives assessable income in the nature of interest paid by the Government or by, a financial institution organized by a specific law of Thailand for the purpose of lending money to promote agriculture, commerce, or industry."

When the provisions of the Revenue Code mentioned above are amended or there is the interpretation of the words "organized under the law of Thailand" and the words "organized under the foreign law" to be as mentioned above, the problems on enforcement and interpretation of the Thai Revenue Code and the Double Tax Treaty between Thailand and other country by using residence rule can be solved. Amendment of those provisions can fill the loopholes of the Thai Revenue Code in determining the company residence of Thailand. It is because the Thai Government can impose tax effectively from the company incorporated in Thailand and the company not incorporated in Thailand but having an effective management in Thailand. When the provisions of the Thai Revenue Code are amended, the interpretation of Article 4 of the Double Tax Treaty between Thailand and other countries, "Resident of the Contracting State" under Thai law, will be considered the place of incorporation together with the place of effective management. That affects to the Thai Government to be able to impose tax efficiently from the company incorporated in Thailand and the company not incorporated in Thailand but having an effective management in Thailand. Moreover, tax avoidance arising from using the loopholes of the Thai Revenue Code about interpretation of the term "resident company" will be disappeared.

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APPENDIX

*455 De Beers Consolidated Mines, Limited v. Howe (Surveyor of Taxes)

House of Lords

HL

Lord Loreburn L.C., Lord Macnaghten , Lord James of Hereford, and Lord Robertson.

1906 July 30

Revenue--Income Tax--Residence--"Person residing in the United Kingdom"-- Company registered Abroad--Head Office Abroad--General Meetings Abroad-- Directors' Meetings in England and Abroad--Majority of Directors in England-- Company's Business in England and Abroad--Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2; Sched. D.

A foreign corporation may reside in this country for the purposes of income tax. The test of residence is not where it is registered, but where it really keeps house and does its real business. The real business is carried on where the central management and control actually abides.

Whether any particular case falls within that rule is a pure question of fact, to be determined not according to the construction of this or that regulation or by-law, but upon a scrutiny of the course of business and trading.

Decision of the Court of Appeal, [1905] 2 K. B. 612, affirmed.

THE facts upon which this appeal turned are fully and clearly stated in the report of the case below. For the purposes of the present report the judgment of Lord Loreburn L.C. is sufficient.

June 18, 19. *Cohen, K.C.*, and *Danckwerts, K.C.*(*F. Cassel* with them), for the appellants. The appellant company is not resident within the United Kingdom. A company incorporated by the law of a foreign country cannot be resident here within the meaning of Sched. D of the Act of 1853. But if to some extent a foreign company may reside here, this company is so constituted that it cannot be considered to be resident here. The first of these contentions is covered by Attorney-General v. Alexander. [FN1]In that case the Imperial Ottoman Bank was held to be resident at Constantinople, though it also carried on business here. Phillimore J. and the Court of Appeal confused the question of personal service of process with that of domicil or *456 residence. The two questions have nothing to do with each other; personal service does not depend on residence. The distinction is pointed out by Blackburn J. in Newby v. Van Oppen and Colt's Patent Firearms Manufacturing Co. [FN2]The mere circumstance that some trade is done in England may suffice for service, but not for taxation: La Bourgogne. [FN3] The mere temporary occupation of a stand at a show was held enough for service in Dunlop Pneumatic Tyre Co. v. Actien-Gesellschaft fur Motor und Motorfahrzeugbau vorm. Cudell & Co. [FN4]

FN1 (1874) L. R. 10 Ex. 20.

FN2 (1872) L. R. 7 Q. B. 293, 295.

FN3 [1899] A. C. 431.

FN4 [1902] 1 K. B. 342.

Wingate & Co. v. Webber [FN5] is an express decision that a foreign company cannot be resident within the United Kingdom; and its agents were taxed "without their relation to the company being expressly specified." A corporation is a legal persona whose only residence is the place of its incorporation, and a foreign company has no legal existence in this country. This is illustrated in the American authorities: Bank of Augusta v. Earle [FN6]; Blackstone Manufacturing Co. v. Inhabitants of Blackstone [FN7]; Ohio and Mississippi Railroad Co. v. Wheeler. [FN8] A company can only have one residence--the place of its foundation. Further, if there be no residence there can be no assessment. The seat of actual authority as fixed by this company's memorandum and articles is the criterion of residence, and that is fixed at Kimberley. The business of the company was conducted at Kimberley, where alone diamonds were delivered to purchasers. The appellants are miners, not merchants, and do not purchase diamonds for resale. The whole of their physical operations are in South Africa. All the general meetings are held at Kimberley, and all shareholders, if they desire to receive notice of these meetings, must have a registered address in South Africa. This distinguishes the case from Goerz & Co. v. Bell. [FN9] The company is taxed in South Africa. Further, the expression "carrying on business" imports habitual transactions. Stress is laid upon the word "habitually" and similar words in ***457** Erichsen v. Last [FN10] by Jessel M.R. and Brett L.J., and in Grainger v. Gough [FN11] by Lord Herschell and Lord Watson. According to this test the appellants did not carry on business here, for during the years of assessment there were only two contracts entered into in the United Kingdom--in April, 1900, and December, 1901. One contract a year does not make a business. Lord Herschell in Grainger v. Gough [FN12] draws "a broad distinction between trading *with* a country and carrying on a trade *within* a country." Here there was no trade carried on within the United Kingdom, and the case is wholly different from London Bank of Mexico v. Apthorpe [FN13] and from San Paulo Ry. Co. v. Carter. [FN14]

FN5 (1897) 3 Tax Cases, 569; 34 Sc. L. R. 699.

FN6 (1839) 13 Peters (U.S.), 519.

FN7 (1859) 13 Gray (Mass.), 488.

FN8 (1861) 1 Black (U.S.), 286.

FN9 [1904] 2 K. B. 136.

FN10 (1881) 8 Q. B. D. 414.

FN11 [1896] A. C. 325, 335, 340.

FN12 *Ibid.* at p. 335.

FN13 [1891] 2 Q. B. 378.

FN14 [1896] A. C. 31.

Even if there is residence and business done in the United Kingdom the assessment is wrong. The tax was here imposed "in respect of the profits of the company in the United Kingdom and elsewhere." Under Colquhoun v. Brooks [FN15]the tax can only be levied on such portion of the income as is remitted to the United Kingdom.

FN15 (1889) 14 App. Cas. 493.

[The question whether the company exercised their trade in this country within s. 2, Sched. D, of the Income Tax Act, 1853 , was not fully argued.]

Sir J. Lawson Walton, A.-G., Sir R. B. Finlay, K.C., and *W. Finlay*, for the respondents, were not heard.

The House took time for consideration.

July 30. LORD LOREBURN L.C.

My Lords, the question in this appeal is whether the De Beers Consolidated Mines, Limited, ought to be assessed to income tax on the footing that it is a company resident in the United Kingdom. Had the appellants prevailed upon that question, an ulterior point would have demanded consideration. Your Lordships, however, being satisfied upon the first point, dispensed with further argument.

Under the 2nd section of the Income Tax Act, 1853, Sched. D, any person residing in the United Kingdom must pay on his annual profits or gains arising or accruing to him ***458** "from any kind of property whatever, whether situate in the United Kingdom or elsewhere," and also "from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere." Now, it is easy to ascertain where an individual resides, but when the inquiry relates to a company, which in a natural sense does not reside anywhere, some artificial test must be applied.

Mr. Cohen propounded a test which had the merits of simplicity and certitude. He maintained that a company resides where it is registered, and nowhere else. If that be so, the appellant company must succeed, for it is registered in South Africa.

I cannot adopt Mr. Cohen's contention. In applying the conception of residence to a company, we ought, I think, 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 really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company. Otherwise it might have its chief seat of management and its centre of trading in England under the protection of

English law, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad. The decision of Kelly C.B. and Huddleston B. in the Calcutta Jute Mills v. Nicholson [FN16] and the Cesena Sulphur Co. v. Nicholson [FN17], now thirty years ago, involved the principle that a company resides for purposes of income tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abides.

FN16 (1876) 1 Ex. D. 428.

FN17 (1876) 1 Ex. D. 428.

It remains to be considered whether the present case falls within that rule. This is a pure question of fact to be determined, not according to the construction of this or that regulation or bye-law, but upon a scrutiny of the course of business and trading.

The case stated by the Commissioners gives an elaborate explanation of the way in which this company carried on its business. The head office is formally at Kimberley, and the *459 general meetings have always been held there. Also the profits have been made out of diamonds raised in South Africa and sold under annual contracts to a syndicate for delivery in South Africa upon terms of division of profits realised on resale between the company and the syndicate. And the annual contracts contain provisions for regulating the market in order to realise the best profits on resale. Further, some of the directors and life governors live in South Africa, and there are directors' meetings at Kimberley as well as in London. But it is clearly established that the majority of directors and life governors live in England, that the directors' meetings in London are the meetings where the real control is always exercised in practically all the important business of the company except the mining operations. London has always controlled the negotiation of the contracts with the diamond syndicates, has determined policy in the disposal of diamonds and other assets, the working and development of mines, the application of profits, and the appointment of directors. London has also always controlled matters that require to be determined by the majority of all the directors, which include all questions of expenditure except wages, materials, and such-like at the mines, and a limited sum which may be spent by the directors at Kimberley.

The Commissioners, after sifting the evidence, arrived at the two following conclusions, viz.:--(1.) That the trade or business of the appellant company constituted one trade or business, and was carried on and exercised by the appellant company within the United Kingdom at their London office. (2.) That the head and seat and directing power of the affairs of the appellant company were at the office in London, from whence the chief operations of the company, both in the United Kingdom and elsewhere, were, in fact controlled, managed, and directed.

These conclusions of fact cannot be impugned, and it follows that this company was resident within the United Kingdom for purposes of income-tax, and must be assessed on that footing. I think, therefore, that this appeal fails.

I will merely add that I agree with the Master of the Rolls that residence of a company within the meaning of the Income *460 Tax Acts is not necessarily the same thing as residence for the purpose of serving a writ.

LORD MACNAGHTEN.

My Lords, I agree.

LORD JAMES OF HEREFORD.

My Lords, I concur in the judgments that have been delivered, holding that the decision of the Court of Appeal should be affirmed.

It is true that the appellant company was registered in the colony, and it was contended that this registration constituted a foreign company which could not be resident within the United Kingdom. But I see no reason why this should be the case. Of course, a foreigner can reside here, and so can a foreign company.

Then upon the facts it seems clear that the business of diamond merchants was carried on by the De Beers Company in England. The principal office was here, the majority of directors met here, and although the diamonds sold came from Kimberley, the profits were realised within the United Kingdom. The company, therefore, resided and carried on business here, and necessarily the provisions of the Act of 1853 as to profits and gains arising or accruing to any persons resident within the United Kingdom, and as to profits and gains arising from any trade exercised within the United Kingdom, apply. The appeal must be dismissed.

LORD ROBERTSON.

My Lords, I agree in the judgment of the Lord Chancellor.

LORD LOREBURN L.C. My Lords, I am requested by my noble and learned friend Lord Atkinson to say that he concurs in the opinion which I have now offered to your Lordships.

Representation

Solicitors: Hollams, Son, Coward & Hawksley; Sir F. Gore, Solicitor of Inland Revenue.

Order of the Court of Appeal affirmed, and appeal dismissed with costs. Lords' Journal, July 30, 1906.