



THE INSTITUTE
OF CHARTERED
ACCOUNTANTS
IN ENGLAND AND WALES



STEP
Society of Trust and
Estate Practitioners



ICAEW TAX FACULTY, CIOT AND STEP GUIDANCE NOTE

TAXGUIDE 3/10

TRUSTEE RESIDENCE

Guidance note agreed by HM Revenue & Customs issued in August 2010 by the Tax Faculty of the Institute of Chartered Accountants in England & Wales, the Chartered Institute of Taxation and the Society of Trust and Estate Practitioners

Contents	
Introduction	Paragraphs 1-6
Who we are: The Institute of Chartered Accountants in England and Wales and the Tax Faculty The Chartered Institute of Taxation The Society of Trust and Estate Practitioners	Paragraphs 7-9 10-12 13
Guidance, comprising memorandum submitted to HMRC on 8 December 2009 with example case studies (Section 1) and specific questions (Section 2) with our initial analysis and HMRC's replies	
The ICAEW Tax Faculty's Ten Tenets for a Better Tax System	Appendix

TRUSTEE RESIDENCE

Guidance note agreed by HM Revenue & Customs issued in August 2010 by the Tax Faculty of the Institute of Chartered Accountants in England & Wales, the Chartered Institute of Taxation and the Society of Trust and Estate Practitioners

FOREWORD

1. This guidance note covers the practical application of the rules in section 475(6) Income Tax Act 2007 and section 69(2D) Taxation of Chargeable Gains Act 1992.
2. HMRC's guidance dated 1 July 2009 sets out their interpretation of how the rules operate. It can be found at www.hmrc.gov.uk/cnr/trustee-res-guidance.pdf.
3. The following guidance note arises from the concern shared by ICAEW, CIOT and STEP that the Finance Act 2006 trust modernisation changes to these rules discourage settlors and trustees from using UK advisers. It derives mainly from a meeting with HM Revenue and Customs ('HMRC') in advance of which the three professional bodies had submitted the example case studies and questions below.
4. The example case studies used in this guidance serve to illustrate the practical application of the legislation and develop some of the principles included in HMRC's own guidance material. It is unlikely that any actual case will correlate to one of the examples – the treatment of any actual case will depend on its own particular facts and be determined by reference to the legislation.
5. In parallel with clarifying with HMRC how the rules apply in practice, the three bodies are engaged in discussions with HM Treasury and HMRC about how the rules themselves might be improved.
6. Information about the Tax Faculty and the ICAEW is given below. The Tax Faculty's Ten Tenets for a Better Tax System which by which proposals to change the tax system are benchmarked are summarised in the Appendix.

WHO WE ARE

The ICAEW and the Tax Faculty

7. The ICAEW operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, the Institute provides leadership and practical support to over 134,000 members in more than 160 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. The Institute is a founding member of the Global Accounting Alliance with over 775,000 members worldwide.
8. Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. The Institute ensures these skills are constantly developed, recognised and valued.
9. The Tax Faculty is the focus for tax within the ICAEW. It is responsible for technical tax submissions on behalf of the Institute as a whole and it also provides various tax services

including the monthly newsletter *TAXline* to more than 11,000 members of the Institute who pay an additional subscription, and a free weekly newswire.

The Chartered Institute of Taxation

- 10 The Chartered Institute of Taxation (CIOT) is a charity and the leading professional body in the United Kingdom concerned solely with taxation. The CIOT's primary purpose is to promote education and study of the administration and practice of taxation. One of the key aims is to achieve a better, more efficient, tax system for all affected by it – taxpayers, advisers and the authorities.
- 11 The CIOT's comments and recommendations on tax issues are made solely in order to achieve its primary purpose: it is politically neutral in its work. The CIOT will seek to draw on its members' experience in private practice, Government, commerce and industry and academia to argue and explain how public policy objectives (to the extent that these are clearly stated or can be discerned) can most effectively be achieved.
- 12 The CIOT's 15,000 members have the practising title of 'Chartered Tax Adviser'.

The Society of Trust and Estate Practitioners

- 13 STEP is the worldwide professional body for practitioners in the fields of trusts and estates, executorship and related issues. STEP members help families secure their financial future and protect the interests of vulnerable relatives. With almost 6,000 members in the UK (and over 15,000 members around the world), STEP promotes the highest professional standards through education and training leading to widely respected professional qualifications.

TRUSTEE RESIDENCE

Guidance note agreed by HM Revenue & Customs issued in August 2010 by the Tax Faculty of the Institute of Chartered Accountants in England & Wales, the Chartered Institute of Taxation and the Society of Trust and Estate Practitioners

CONTENTS

Section 1: Case Studies

- Trustee carrying out duties for the administration of any trust (Examples 1-12)
- Dependent agent (Examples 13-20)
- Individual non-resident trustee (Examples 21-23)

Section 2: Specific Examples (Examples 24-29)

SECTION 1: CASE STUDIES

In the text below the HMRC Trustee Residence Guidance (Version 1) released on 1 July 2009 is referred to as “the Guidance”.

TRUSTEE CARRYING OUT DUTIES FOR THE ADMINISTRATION OF ANY TRUST

There is a suggestion at section 2 of the Guidance that when “*considering whether the corporate trustee is carrying on the administration of a particular trust in the course of their business through the permanent establishment, the frequency of the meetings will be looked at as well as their significance and quality*”. The following examples are intended to clarify this aspect of the Guidance. In each case the trustee is the non-UK resident subsidiary of a financial services group.

Example 1

The Alpha Trust is subject to English law. The trustee of the settlement is a Trust Company resident in Switzerland, which is a subsidiary of an international bank that has offices and outlets in the UK. Doubts have arisen over the precise scope of some of the provisions in the trust deed, with the result that leading Counsel in London has been instructed to advise. Based on the advice given, the trustee further instructs Counsel to submit an application to vary the terms of the trust deed. In view of the importance attached to the advice received from Counsel, and the application to vary the terms of the trust deed, the trustee has sent a representative to the UK for a month to liaise with Counsel and the trustee’s London solicitors. He stays in the same London hotel throughout this period, and has regular meetings at the London offices of the trustee’s solicitors.

Analysis

The trustee’s representative is present in the UK for a month, holding many meetings with Counsel, the trustee’s solicitors and attending Court. Key decisions are still taken by the trustees in Switzerland. The presence of the trustee’s representative is in respect of an exceptional event in the trust’s ‘life time’. It cannot be taken into account in establishing whether or not the Trust Company is acting as a trustee in the course of its business through a permanent establishment in the UK. Although the trustee’s representative stays at the same hotel throughout, and attends meetings with the trustee’s legal advisers, his occupation/attendance in relation to the Court application and related matters will not constitute a permanent establishment. This is because the occupation/attendance at these places will lack the required degree of permanence required of a fixed place of business. As soon as the Court proceedings are over, the attendance/occupation at these places for this purpose will cease. Even if a permanent establishment could be said to exist, the trustee could not be said to be resident in the UK. As no decisions are taken by the trustee’s representative, and he simply acts as directed, none of his activities in connection with the legal

proceedings can be considered to be those of the trustee undertaken through a permanent establishment in the UK.

HMRC answer

As set out in the guidance there are 3 examples in considering whether a trust is resident. Before considering whether trust business is conducted through a permanent establishment (PE) it is first necessary to establish whether the trustee company carries on a business through a PE (in some cases they may already have to do this to decide whether there are any profits that need to be returned in UK). Only if the trustee company is carrying on a business through a PE is it necessary then to look at the individual trust and whether the trustee is carrying out the business in relation to a particular trust through that PE. In a number of examples it seemed unlikely that the corporate trustee was carrying on a business through a fixed place of business PE in the UK. It was, therefore, unnecessary to look any further at the activities carried out in relation to a particular trust.

The trust is not resident in the UK because there is no PE in the UK, or to explain, although there was business conducted in the UK the business was not undertaken via a PE.

Example 2

As in Example 1, save that the occasion for the trustee's representative being present in the UK is the sale of shares in a UK private company held by the trustee. As before the trustee's representative attends meetings with advisers and reports back to the Trust Company which is resident outside the UK.

Analysis

In Example 1, there is no permanent establishment within the UK, so the trustees could not be said to be UK resident. Even if there were not to be the case the trustee had little choice but to use the UK Courts to vary the terms of the settlement as this was a trust with an English governing law. Similarly, in this example, the trustee has little choice but to send its representative to the UK to liaise with advisers. The key decisions are still taken by the trust company abroad. The analysis is thought to be directly comparable, with the result that none of the activities of the trustee representative in London in connection with the sale can be considered to be those of the trustee undertaken through a permanent establishment in the UK.

HMRC answer

See HMRC answer to Example 1.

Example 3

The Beta Trust is non UK resident. Its trustee is a Trust Company resident in the Isle of Man, which is a subsidiary of an international bank. It has a number of beneficiaries, all of whom are currently UK resident. Trust officers from the trustee company make regular visits to the UK. They do this to discuss performance of the trust's investments with their independent investment advisers who are based in the UK and are unconnected with the trust company. They also visit the beneficiaries. No other meetings are held with any other advisers except for meetings with the trustee's Isle of Man legal advisers as circumstances dictate.

Analysis

The fact that no regular meetings are held outside the UK with beneficiaries or advisers has no bearing on whether the trustee is carrying on a business of being a trustee through a UK permanent establishment constituted by the trust officer when he visits the UK. There is no permanent establishment on the facts as given, and therefore the Trust is non-UK resident.

HMRC answer

It is unlikely that the corporate trustee is carrying on a business through a fixed place of business PE in the UK.

Where a trustee representative is carrying on trust business in the UK they may be a dependent agent of the trustee, but it still needs to be “habitually” acting in this way so a one-off event is unlikely to create a dependent agent PE.

Example 4

Facts are as in Example 3 with the addition that the trustees arrange in 2009/10 a meeting with all the beneficiaries to explain the significance of changes to the trust deed. The UK is the most convenient location for this meeting which is held at a London hotel.

Analysis

The hotel does not constitute a permanent establishment and accordingly the trustees cannot be UK resident. Even if premises were used that were capable of constituting a permanent establishment the trustees would not be UK resident. This is because the purpose of the meeting is auxiliary to the core activities of the trustee, as these would be the process of deciding on the amendments to the trust deed which was not carried on in the UK. In addition, a meeting on a single occasion at an hotel would not mean the trustees are carrying on their core business through a permanent establishment in the UK. On these facts the trustees are not UK resident in 2009/10.

HMRC answer

See HMRC answer to Example 3.

Example 5

The Gamma Trust is non UK resident. Its trustee is a Trust Company resident in Guernsey, which is a subsidiary of an international bank. It has a number of beneficiaries, all of whom are currently UK resident.

The trust property consists of an extensive investment portfolio managed by a UK resident investment management company owned by the parent company.

The contract between the Gamma Trust and the investment manager is on entirely arm's length terms. Before appointing the investment manager the trustee set down the parameters within which the investment manager was to work and targets which it expected to be met in terms of investment performance. The investment mandate is discretionary. The performance of the investment manager is reviewed against the targets set by the trustees on a quarterly basis. The investment instructions and performance targets are also reviewed quarterly and modified where appropriate.

A trust officer from the trustees visits the UK to meet with the beneficiaries on a quarterly basis. These meetings either take place over dinner, at the hotel where the trust officer is staying or in the homes of the beneficiaries. During the quarterly trips to the UK of the trust officer, representatives from the investment management company will also meet with the trust officer to report on the investment performance for the last quarter. The meetings take place either at the offices in the UK of a third party adviser (the accountant) or at the hotel where the trust officer is staying. No meetings in the UK are held at the offices of the investment fund manager. No other meetings are held with any other advisers except as circumstances dictate for meetings with the trustee's Guernsey legal advisers.

Analysis

The fact that the investment manager is UK resident and in the same group as the non resident trust company does not mean that the trustee is carrying on a business of being a trustee through a UK permanent establishment. The terms on which work is carried out for the trustee are on an arm's length basis and trust officers do not hold meetings with respect to the business of being a trustee of the Gamma Trust at the UK offices of a group company.

Whilst the investment manager has a discretionary investment mandate the terms are the same as offered to other third party clients and no use is made of the investment manager's UK offices. The fact that the trust has no other assets apart from the investment portfolio does not alter this analysis as the trustee has set down instructions on how the fund manager should operate and targets which should be met and the performance of the investment manager is reviewed regularly.

Meetings with beneficiaries are either at restaurants, in the hotel where the trust officer is staying or in the homes of the beneficiaries. As such the trustee cannot be said to be conducting business through a fixed permanent establishment in the UK.

As in Example 3 the fact that no regular meetings are held outside the UK with beneficiaries or advisers is irrelevant.

On these facts the Trust is non-UK resident.

HMRC answer

It is unlikely that the corporate trustee is carrying on a business through a fixed place of business PE in the UK. As the investment manager is on entirely arm's length terms, there is unlikely to be a dependent agent PE. If the trust company is not carrying on a business in the UK through a PE, it is unnecessary to look any further at the activities carried out in relation to the trust.

Where a trust representative is carrying on trust business in UK they may be a dependent agent of trustee, but it still needs to be "habitually" acting in this way.

Example 6

The Delta Trust is non UK resident. Its trustee is a Trust Company resident in Gibraltar. It has a number of beneficiaries, all of whom are currently UK resident.

The trust property consists of an extensive investment portfolio managed by a UK resident investment management company owned by the parent company and a number of UK properties (a UK resident third party letting agent being employed). The trust accounts are also prepared by a UK resident accounting group company.

The contract between the Delta Trust and the investment manager is on entirely arm's length terms. Before appointing the investment manager the trustee set down the parameters within which the investment manager was to work and targets which it expected to be met in terms of investment performance. The investment mandate is discretionary. The performance of the investment manager is reviewed against the targets set by the trustees on a quarterly basis. The investment instructions and performance targets are also reviewed quarterly and modified where appropriate.

The engagement letter between the trustees and the UK resident accounting group company is on arm's length terms.

A trust officer from the trustees visits the UK to meet with the beneficiaries on a quarterly basis. These meetings either take place over dinner, at the hotel where the trust officer is staying or in the homes of the beneficiaries. During the quarterly trips to the UK of the trust officer, representatives from the investment management company will also meet with the trust officer to report on the

investment performance for the last quarter. The meetings take place at the hotel where the trust officer is staying.

There are no meetings with the UK resident accounting group company as all communication is by telephone, e-mail or letter/fax.

No meetings in the UK are held at the offices of the investment fund manager or the accounting group company. No other meetings are held with any other advisers except as circumstances dictate for meetings with the trustee's legal advisers in Gibraltar.

All trust decisions are taken outside of the UK after due deliberation.

Analysis

The fact that the UK resident investment manager and the UK resident accountant are in the same group as the non resident trust company does not mean that the trustee is carrying on a business of being a trustee through a UK permanent establishment. The terms on which work is carried out for the trustee are on an arm's length basis and trust officers do not hold meetings to deal with the business of this trust at the UK offices of a group company.

The analysis with respect to the discretionary investment mandate is the same as for Example 5. The analysis with respect to the meetings with beneficiaries is also the same as in Example 5.

As in Example 3 the fact that no regular meetings are held outside the UK with beneficiaries or advisers has no bearing on whether the trustee is carrying on a business of being a trustee through a UK permanent establishment constituted by the trust officer when he visits the UK.

On these facts the Trust is non-UK resident.

HMRC answer

Where services are provided on an arm's length basis then there is unlikely to be a dependent agent PE.

Where a trust representative is carrying on trust business in UK they may be a dependent agent of trustee, but it still needs to be "habitually" acting in this way.

Example 7

The Epsilon Trust is non UK resident. Its trustee is a Trust Company resident in Gibraltar. It has a number of beneficiaries, all of whom are currently UK resident.

The trust property consists of an extensive investment portfolio managed by a UK resident investment management company owned by the parent company and a number of UK properties (a UK resident third party letting agent being employed). The trust accounts are also prepared by a UK resident accounting group company.

The contract between The Epsilon Trust and the investment manager is on entirely arm's length terms. Before appointing the investment manager the trustee set down the parameters within which the investment manager was to work and targets which it expected to be met in terms of investment performance. The investment mandate is discretionary. The performance of the investment manager is reviewed against the targets set by the trustees on a quarterly basis. The investment instructions and performance targets are also reviewed quarterly and modified where appropriate.

The engagement letter between the trustees and the UK resident accounting group company is on arm's length terms.

A trust officer from the trustees visits the UK to meet with the beneficiaries on a quarterly basis. These meetings either take place over dinner, at the hotel where the trust officer is staying or in the homes of the beneficiaries. During the quarterly trips to the UK of the trust officer, representatives from the investment management company will also meet with the trust officer to report on the investment performance for the last quarter. The meetings take place at the offices of the UK resident accounting group company at the same time as the trust officer drops off the last quarter's accounting records and collects the previous quarter's records. Thus the meetings take place at the UK offices of a Group company.

The quarterly trips to the UK by the trust officer are for the purposes of collecting information. The trust officer makes no decisions whilst in the UK (indeed he or she does not have sufficient authority to make decisions whether in the UK or offshore) and reports back to his or her superiors who make the decisions offshore after due deliberation.

All trust decisions are taken outside of the UK after due deliberation.

Analysis

The analysis with respect to the discretionary investment mandate is the same as for Example 5. The analysis with respect to the meetings with beneficiaries is also the same as in Example 5.

The fact that the UK resident investment manager and the UK resident accounting group company are in the same group as the non resident trust company does not mean that the trustee is carrying on a business of being a trustee through a UK permanent establishment. The terms on which work is carried out for the trustee are on an arm's length basis and trust officers do not hold meetings to deal with the business of this trust at the UK offices of a group company as the meetings are incidental rather than with respect to the business of being a trustee which is all carried out outside the UK.

On these facts the Trust is non-UK resident.

HMRC answer

Where services are provided on an arm's length basis then there is unlikely to be a dependent agent PE.

Example 8

The Zeta Trust is non UK resident. Its trustee is a Trust Company resident in Gibraltar. It has a number of beneficiaries, all of whom are currently UK resident.

The investment performance of the trust was very poor and the trustee decided that it was necessary to replace the investment managers. The shortlist of possible new investment managers was drawn up and all four were UK resident. As such it was decided that the decision would be made after a beauty parade of the four short-listed investment managers. This beauty parade was held in the UK in the conference facilities of the hotel where the trustee representatives were staying. As well as making decisions on the investment manager during the visit to the UK the trustee representatives met with beneficiaries (over lunches and dinners held at various London restaurants) and make decisions as to trust distributions.

Analysis

The business of the trustees with respect to The Zeta trust was clearly carried out in the UK but not at a permanent establishment as the trust company was not acting out of a fixed UK place of business.

On these facts the Trust is non-UK resident.

HMRC answer

Where a trustee representative is carrying on trust business in the UK they may be a dependent agent of the trustee, but it still needs to be “habitually” acting in this way so a one-off event is unlikely to create a dependent agent PE.

Example 9

The Eta Trust is non UK resident. Its trustee is a Trust Company resident in the Isle of Man. It has a number of beneficiaries, all of whom are currently UK resident.

The trust property consists of an extensive investment portfolio managed by a third party UK resident investment management company.

Trustee representatives met with beneficiaries on a quarterly basis (over lunches and dinners held at various London restaurants) and make decisions as to trust distributions.

There are also quarterly meetings between the trustees and the investment managers at which key decisions are taken with respect to the management of the trust property and instructions are given to the fund manager with respect to the trust distribution policy for the upcoming quarter. These meetings take place either at the conference facilities of the hotel where the trustee representatives are staying or at the offices of the investment manager.

Analysis

The business of the trustees with respect to The Eta trust was clearly carried out in the UK but not at a permanent establishment as the trust company was not acting out of a fixed UK place of business.

On these facts the Trust is non-UK resident.

HMRC answer

Where a trustee representatives are carrying on trust business in the UK they may be a dependent agent of the trustee, but it still needs to be “habitually” acting in this way so a one-off event is unlikely to create a dependent agent PE.

Example 10

The Theta Trust is non UK resident. Its trustee is a Trust Company resident in the Isle of Man. It has a number of beneficiaries, all of whom are currently UK resident.

The trust property consists of an extensive investment portfolio managed by a UK resident investment management company owned by the parent company.

The contract between the Theta Trust and the investment manager is on entirely arm's length terms. Before appointing the investment manager the trustee set down the parameters within which the investment manager was to work and targets which it expected to be met in terms of investment performance. The investment mandate is discretionary. The performance of the investment manager is reviewed against the targets set by the trustees on a quarterly basis. The investment instructions and performance targets are also reviewed quarterly and modified where appropriate.

A trustee officer meets with beneficiaries on a quarterly basis using the offices of the UK resident investment company. As part of the same visit to the UK there are also meetings with the investment managers to receive their report on investment performance over the last quarter. At the end of each day the trust officer (who does not have the power to make any decisions) reports back the findings from his or her information collection meetings to his or her superiors.

Sometimes after hearing the reports from the trust officer a video conferencing call will be arranged with the trustee representatives and beneficiaries and/or the investment managers to clarify some points. Key decisions are made during the conversations.

Analysis

The fact that the UK resident investment manager is in the same group as the non resident trust company does not mean that the trustee is carrying on a business of being a trustee through a UK permanent establishment. The terms on which work is carried out for the trustee are on an arm's length basis. The analysis with respect to the discretionary investment mandate is the same as for Example 5. The analysis with respect to the meetings with beneficiaries is also the same as in Example 5.

The trust officer used the offices of the UK resident group manager but the business of the trustees is not carried out through these offices as all decisions occur outside of the UK. The fact that there is a video conference call in which key decisions were made does not negate this as the trust representatives who had the power to make the decisions were all offshore when the decisions were made.

On these facts the Trust is non-UK resident.

HMRC answer

Although the offices of the related entity are visited on a regular basis, no decisions are made in the UK, i.e. all decisions are made outside the UK.

Example 11

The Iota Trust is non UK resident. Its trustee is a Trust Company resident in Guernsey. It has a number of beneficiaries, all of whom are currently UK resident.

The trust property consists of an extensive investment portfolio managed by a UK resident investment management company owned by the parent company.

The contract between the Iota Trust and the investment manager is on entirely arm's length terms. Before appointing the investment manager the trustee set down the parameters within which the investment manager was to work and targets which it expected to be met in terms of investment performance. The investment mandate is discretionary. The performance of the investment manager is reviewed against the targets set by the trustees on a quarterly basis. The investment instructions and performance targets are also reviewed quarterly and modified where appropriate.

There are quarterly meetings between the trustees and the investment managers at which key decisions are taken with respect to the management of the trust property and instructions are given to the fund manager with respect to the trust distribution policy for the upcoming quarter. These meetings take place using video conferencing technology such that the trustees are in Guernsey and the investment managers in the UK. As such all trust decisions are taken outside the UK.

Analysis

The fact that the UK resident investment manager is in the same group as the non resident trust company does not mean that the trustee is carrying on a business of being a trustee through a UK permanent establishment. The terms on which work is carried out for the trustee are on an arm's length basis. Whilst the fund managers are in the UK when the quarterly meetings take place the trustee representatives are outside the UK and all decisions are taken outside the UK.

The analysis with respect to the discretionary investment mandate is the same as for Example 5. The analysis with respect to the meetings with beneficiaries is also the same as in Example 5.

On these facts the Trust is non-UK resident.

HMRC answer

It is unlikely that the corporate trustee was carrying on a business through a fixed place of business PE in the UK.

Where services are provided on an arm's length basis (in this case by the investment management company) then there is unlikely to be a dependent agent PE.

Example 12

The Kappa Trust was established by a settlor who has never been UK resident. The trustee is a non UK resident corporate trustee, which is a subsidiary of a major international bank.

The trustee has extensive investment interests around the world, including the UK. There are a number of beneficiaries, one of whom lives in the UK. It is the trustee's practice to hold a meeting with their European advisers when they fly through Heathrow, en route to see their advisers in North America. Meetings are held in one of many hotels near the airport. The trustee makes decisions at these meetings on minor administrative aspects and receives legal and tax advice on various European issues. The trustee does not hold meetings at the premises of any subsidiary of their parent company which is based in the UK. UK visits amount to an average of approximately four a year out of a total number of meetings in excess of 20 with other advisers around the world. Major decisions are always taken outside the UK after long periods of discussion.

Analysis

Whilst the meetings in the UK do in part relate to trustee activity and the decisions made will represent core activities there is no degree of permanence as regards the premises used for the business activity. This lack of permanence as regards the premises used means that the decisions made by the trustees have no bearing on whether they are resident in the UK. Even if the premises possessed the requisite degree of permanence the overall activity undertaken by the trustee at the meetings in the UK is relatively minor and insufficient on its own to make the trustee UK resident.

HMRC answer

It is unlikely that the corporate trustee was carrying on a business through a fixed place of business PE in the UK. It is, therefore, unnecessary to look any further at the activities carried out in relation to the particular trust.

DEPENDENT AGENT

The Guidance of 1 July 2009 sets out at section 3 HMRC's position where activities are carried on for the trust other than by the non-UK resident trust company. The Guidance states at 3.3 that where, "say, a UK subsidiary of a non-UK resident trust company is providing services to a trust, then unless the powers granted to it by the non-UK resident trust company are such that it becomes a 'dependent agent with authority to do business on behalf of the non-resident trustee'... we will not contend that the UK subsidiary's actions cause the non-UK resident trustee company to have a permanent establishment". The following examples are intended to clarify HMRC's position. In all of the examples the offshore trustee is a non-resident trust company which is the subsidiary of an international financial services group.

Example 13

Mr L is UK resident and is the principal beneficiary of The Lambda Trust which is non-UK resident with a Jersey governing law. The trust owns a number of UK residential properties, and the Trust Company has asked Mr L to advertise for new tenants on their behalf. He passes any details he receives to the trustee, who takes up references and enter into any tenancy agreement direct with the new occupiers.

Very occasionally Mr L may receive a request by the trustee to engage a plumber or an electrician to undertake emergency work in relation to the let properties held by the trust.

Mr L receives no remuneration for any aspect of his involvement, albeit his expenses are refunded.

Analysis

Mr L does not have any authority to enter into tenancy agreements on behalf of the trustees. He only engages plumbers or electricians on behalf of the trustee very infrequently. Mr L's involvement lacks the element of frequency or permanence required to make him a dependent agent and thereby deem the trust to have a UK permanent establishment.

HMRC answer

Someone who does not have authority to act on behalf of the trust but does the occasional small task for which they are not remunerated is unlikely to create a dependent agent PE.

Example 14

Mr M is UK resident and is the principal beneficiary of The Mu trust which is non-UK resident with a Guernsey governing law. The trust owns a number of UK residential properties. The trustee employs a UK letting agent but Mr M keeps an eye on the properties to ensure that they are managed properly, as regards the cleaning, gardening, emergency repairs that tradesmen engaged by the letting agents undertake. He reports back to the trustees, so they can authorise that payment can be made.

Analysis

Mr M does not have an authority to enter into any tenancy agreement, or engage work to be undertaken for the trustees. He is not a dependent agent and therefore there is no deemed UK permanent establishment.

HMRC answer

Someone who does not have authority to act on behalf of the trust, but does the occasional small task for which they are not remunerated is unlikely to create a dependent agent PE. But if other than occasional then the trust should think about remunerating on arm's length basis to put matter beyond doubt.

Example 15

Mr N is UK resident and is the principal beneficiary of the Nu Trust. Periodically he provides the trustee with a letter of wishes, identifying certain categories of asset or specifically identified investments he would like them to make. The letters are non-binding.

Analysis

Mr N is not engaged as an investment adviser by the trustee, and they are free to accept or decline his requests as they feel fit after they have taken appropriate professional advice. Mr N is not a dependent agent.

HMRC answer

If a beneficiary writes to the trustees with a letter of wishes which the trustees are not bound by then that will not create a dependent agent PE. The trust is non-UK resident.

Example 16

The trustee of the Xi Incentivisation trust is a corporate trustee resident in Guernsey. The trust itself is an employment benefit trust for the UK employees of Xi International which is a UK resident and quoted company. Representatives from the trust company visit the UK periodically, and attend the offices of Xi International for an update on company performance and strategy. No decisions are taken in the UK. The remuneration committees of Xi international will send a non-binding letter of recommendation to the trustees concerning awards to be made to employees as part of the incentivisation plan. The trustees take considered decisions and make discretionary appointments, but only outside the UK.

Analysis

The trustees are simply collecting information when they visit the UK, and catching up with Xi International on recent developments. The meetings at Xi International's premises will not constitute a permanent establishment. Trustee decisions are only made outside the UK. The trust is resident outside the UK.

HMRC answer

As the activities were simply auxiliary, not 'core', they are ignored for the purpose of considering trustee residence status.

If the trustees had engaged in 'core' activities during the visits to the UK, the settlor's premises could be a PE if the meetings were monthly. However, if the meetings were less frequent, this may lack the requisite degree of permanence required of a PE.

Example 17

The trustee of the Omicron Incentivisation trust is a corporate trustee resident in Jersey. The trust itself is an employment benefit trust for the UK employees of Omicron International which is a UK resident and quoted company. Representatives from the trust company visit the UK periodically, and meet representatives of Omicron International for an update on company performance and strategy at the London office of a UK sister subsidiary of the corporate trustee. Final decisions as regards future awards are regularly taken at those London meetings.

Analysis

Trustee decisions are taken at the London Offices of sister subsidiary of the Trust company. Hence the Corporate trustee is acting in the UK as a trustee in relation to the Omicron

Incentivisation Trust at premises in the UK which constitute a permanent establishment in relation to its own activities. The trust is UK resident.

HMRC answer

Having offices at the disposal of the professional trustee in the UK is likely to create a fixed place of business PE, but only if the activity that is carried out at that PE in relation to a particular trust is a core activity will the trustee be regarded as having a PE for the purposes of that trust.

Example 18

The Pi Settlement has a protector, with powers to appoint and remove trustees and to prevent certain decisions of the trustee being implemented. The sole corporate trustee is resident outside the UK. The protector may be UK resident, or non-UK resident, but if non resident, will visit the UK to see the settlor and/or the current principal adult beneficiaries from time to time. They may or may not receive a fee for acting as a protector.

Analysis

In most normal circumstances the protector will not be a trustee, and is not an agent of the trustees. As a result he or she cannot be a dependent agent. The trust remains non-UK resident.

HMRC answer

If a protector is appointed then if they are not the trustee and are not a dependent agent of the trustee then they will not create a PE for the trust.

Example 19

The Rho Trust is governed by Jersey law and has two non-resident trustees. One trustee is a corporate trustee Sigma Limited which is a professional trustee carrying on trustee business in Jersey and the other trustee is Mr S who is a Jersey resident lawyer who also carries on a trustee business. The settlor is (and was at the date of settlement) UK resident.

Sigma Limited and Mr S appoint investment managers in the UK to whom they delegate investment discretion. The investment manager is unconnected with both Sigma Limited and Mr S and provides normal investment management services at an arm's length fee. It has authority to conduct business on behalf of the trustees. On that analysis the Guidance would accept that in relation to Sigma Limited the investment manager is an independent agent and would therefore not constitute a permanent establishment. The position should logically be the same for Mr S. It is true that the Guidance at paragraph 7 suggests that the independent agent exemption applies only to corporate trustees. There is scope for suggesting this is the case, in that although section 10(6) TCGA provides that a branch or agency does not include any person within the exemption in section 82 TMA 1970 (which excluded independent agents from the definition of branch or agency), section 82 was repealed by Finance Act 1995. However the reference in section 10(6) to section 82 was not also repealed and it is possible that section 17(2)(a) of the Interpretation Act 1978 preserves section 82 in the context of section 10(6).

This analysis would mean that the position for individual trustees in relation to income tax would be worse than that in relation to capital gains tax.

We should welcome HMRC confirmation that in the context of section 10(6) TCGA the independent agent exemption would in the light of the above analysis apply to individual trustees for capital gains tax and that, consistently with this, a similar view would be taken in relation to income tax.

HMRC answer

The independent agent exemption is relevant only to corporate trustees. However, an independent agent can create a charge to income tax. A key aspect of agency is that the agent must have

authority to do business on behalf of the non-resident, so it won't always make a lot of difference in practice.

HMRC agreed that the position in respect of the reference to s82 TMA 70 in s10(6) TCGA 1992 is not immediately clear and they will clarify it.

Example 20

The Tau Trust of which Upsilon Limited, a Jersey corporate trustee, is the trustee appoints Upsilon Investment Management Limited in the UK to manage the investments of the Tau Trust. Upsilon Limited is the holding company of Upsilon Investment Management Limited. Upsilon Investment Management Limited provides investment management services primarily for entities within the Upsilon Group. It operates on arm's length terms on the same basis as that offered to third party unconnected clients but these form a small minority of the clients. Over 70% of the services provided by Upsilon Investment Management Limited are provided to Upsilon Limited and other connected persons.

Example 3a in the HMRC Guidance is similar in dealing with the delegation of investment discretion to a UK investment manager. The example considers that the investment manager should qualify as an independent agent. Reference is made to this being in line with the investment manager exemption.

We assume this is a reference to paragraph 3 Schedule 26 Finance Act 2003. Schedule 26 would seem to be relevant only by analogy because it deals with trading being carried on by the investment manager in the UK on behalf of the non-resident principal (SP1/01(07) (ie as revised July 2007) paragraph 14). It is therefore not relevant where investment transactions are carried out and whether or not the other provisions of Schedule 26 are complied with.

We should welcome HMRC confirmation that where trading is not being carried out by the investment manager on behalf of the non-resident trustee, but merely investment management, then the independent agent exemption will apply without reference to Schedule 26 if the investment manager or other agent is acting on arm's length terms, and that the fact there is a corporate relationship (such as the two entities being in the same corporate group) will not prevent the independent agent status applying.

HMRC answer

It doesn't matter that there is a corporate relationship between the investment manager and the trustee (such as the two entities being in the same corporate group) and this will not prevent the independent agent status applying. This follows the principle in the OECD Commentary on Article 5 that a subsidiary is not automatically assumed to be a dependent agent of its parent.

HMRC confirm that where trading is not being undertaken by the investment manager, but merely investment management, then there should be no difficulty provided the remuneration and terms are arm's length, and it is not necessary in this context that the other requirements of Schedule 26 and SP1/01/07 are satisfied.

INDIVIDUAL NON-RESIDENT TRUSTEE

Example 21

The Phi Trust is subject to English law. The trustee of the settlement is a professional lawyer resident in Switzerland. Doubts have arisen over the precise scope of some of the provisions in the trust deed, with the result that leading Counsel in London has been instructed to advise. Based on the advice given, the trustee further instructs Counsel to submit an application to vary the terms of the trust deed. In view of the importance attached to the advice received from Counsel, and the application to vary the terms of the trust deed, the professional trustee comes to the UK for a month to liaise with Counsel and the trust's London solicitors. He stays in the same London hotel throughout this period, and has regular meetings at the London offices of the trust's solicitors.

Analysis

The professional trustee is present in the UK for a month, holding many meetings with Counsel, the trust's solicitors and attending Court. Although the trustee stays at the same hotel throughout, and attends meetings with the trust's legal advisers, his occupation/attendance in relation to the Court application and related matters will not constitute his acting as a trustee in the course of business carried out in the UK through a branch or agency. This is because the occupation/attendance at these places will lack the required degree of permanence required. The trustee cannot be a branch or agency of himself. As soon as the Court proceedings are over, the attendance/occupation at these places for this purpose will cease.

On these facts the Trust is non-UK resident.

HMRC answer

HMRC accept that the trustee cannot be an agent of himself. There seemed to be an inference that this would not necessarily be so as regards the existence of a branch. HMRC said that overall they would seek to apply the same broad treatment to branch and agencies as for a PE. There seemed to be an inference that the position would be more favourable where there was a governing treaty, and less so where there wasn't.

Example 22

As in Example 21, save that the occasion for the trustee being present in the UK is the sale of shares in a UK private company held by the trustee. As before the trustee attends meetings with advisers.

Analysis

In Example 21, the trustee had little choice but to use the UK Courts to vary the terms of the settlement as this was a trust with an English governing law. Similarly, in this example, the trustee has little choice but to come to the UK to liaise with advisers. The analysis is thought to be directly comparable, with the result that none of the activities of the trustee in London in connection with the sale can be considered to be those of the trustee acting through a branch or agency in the UK. On these facts the Trust is non-UK resident.

HMRC answer

The short length of time spent in the UK suggested that the trustee was not UK resident. As the trustee could not be an agent of him or herself, it was necessary to establish whether their activities could amount to being a branch. If the trustee simply took out an office for a month, it was unlikely that they could be said to have established a branch. If they had use of rooms at their independent lawyers, it would not be possible to say that this amounted to a branch. If they had use of a room there and conducted other business from it, it is possible that this might amount to a

branch but it was unlikely that this would be the case unless they made use of the accommodation provided in this way for some considerable time.

Example 23

The Chi Trust is non UK resident. Its trustee is a professional adviser who is resident in the Isle of Man. The trust's accountant is UK resident and entirely unconnected with the trustee. It has a number of beneficiaries, all of whom are currently UK resident. The trustee makes quarterly visits to the UK (remaining here for two to three days at most). He does this to visit the beneficiaries. Meetings are either held at the homes/places of work of the beneficiaries, at restaurants (over lunch/dinner) or occasionally at the offices of the trust's accountant. At these meetings decisions may be taken with respect to distribution policy. At one meeting held at the accountant's offices legal documentation was signed with respect to a loan to a beneficiary. On these facts the Trust is non-UK resident.

Analysis

The fact that no regular meetings are held outside the UK with beneficiaries has no bearing on whether the trustee is carrying on a business of being a trustee through a UK branch or agency. There is no fixed place of business in the UK and the trustee cannot be a branch or agency of himself.

HMRC answer

It was agreed that the trustee could not be an agent of themselves.

SECTION 2: SPECIFIC QUESTIONS

OFFSHORE INDEPENDENT TRUST COMPANY; NO GROUP COMPANIES IN UK; NO PREMISES IN UK; ARRANGEMENTS WITH UK PROFESSIONALS

Example 24

Tamar Trustees is an independent Jersey trust company. Its shareholders are its four directors, all of whom are Jersey resident. It has no group company or any other affiliated company in the UK. It has no premises in the UK.

CT Legal LLP is a UK law firm which has a good relationship with Tamar Trustees. They have worked together well over the years; the principals know each other well; and they have a number of mutual clients which have been referred in both directions. There are no formal referral arrangements, however, and no exclusivity – both CT Legal and Tamar also refer clients to other firms. There are no financial tie-ups between the firms.

Where the settlor or beneficiaries of one of Tamar's trusts are also clients of CT Legal, the meetings have typically happened at CT's offices in Winchester.

We should welcome confirmation of whether the Winchester premises count as a PE of Tamar in the following cases:

- (a) Meetings only take place for mutual clients with both Tamar and CT staff present

HMRC answer

As the meeting rooms are only made available by invitation, there is no right to use them or an automatic expectation of such a right, there is no PE.

- (b) CT may occasionally offer the free use of a meeting room to Tamar, to meet their mutual clients even though CT staff do not attend the meeting.

HMRC answer

As the meeting rooms are only made available by invitation, there is no right to use them or an automatic expectation of such a right, there is no PE.

- (c) CT may occasionally offer the free use of a meeting room to Tamar to meet new clients. The new clients are not existing clients of CT but CT hope to impress them with the use of their meeting rooms and hopefully sign them up as clients.

HMRC answer

The activity is preparatory so whether or not there is a PE doesn't matter.

- (d) CT may occasionally offer the free use of a meeting room to Tamar to meet Tamar's clients. There is no prospect of those clients becoming CT's clients. CT merely offer this facility due to their relationship with Tamar. They do not charge Tamar because the meeting rooms are otherwise empty and so there is virtually no marginal cost to CT in doing so. CT merely benefit from an ongoing good relationship with Tamar.

HMRC answer

The availability of the accommodation is at CT's discretion, so there is no PE.

- (e) (f) (g) as in (b) (c) and (d) respectively above, save that Tamar become so used to this arrangement that they no longer call the client partner at CT, but simply contact the CT receptionist and ask if they can have a room in which to meet clients. The CT receptionist occasionally refuses where there are no spare meeting rooms.

HMRC answer

Examples (e) + (f) + (g) – it is doubtful that the meeting room is at the disposal of Tamar, so no PE.

- (h) (i) (j) as in (e) (f) (g) save that, while the CT receptionist could theoretically refuse, this has never happened in practice such that Tamar always get a meeting room when they ask.

HMRC answer

Examples (h) + (i) + (j) – there could be a PE if the meetings were frequent enough.

Even if it is found that the trust does have a fixed place of business PE then the trustee will be resident in respect of a particular trust where that trustee's core activities are carried out at that PE.

- (k) (l) (m) as in (e) (f) (g) save that CT make a nominal £25 charge for each occasion to cover tea/biscuits etc.
and
(n) (o) (p) as in (h) (i) (j) save that CT make a nominal £25 charge as above.
and
(q) as in (d) save that CT make a £90 per hour charge to Tamar for the use of the meeting room.

HMRC answer

- (k) to (q) Payment strengthens the argument that a PE exists, up to (q) where there is a right to occupy.

This was challenged by reference to the analogy of using a room in a hotel. HMRC said that meeting in a hotel room could be a problem if it became known that the trustees were conducting business in a hotel on certain days. However, if different hotels were used it would lack the degree of permanence required. HMRC felt that using a room in a hotel every month for (say) 3 years, could be caught. Meetings which involved an element of discretion were unlikely to be caught. This would apply to meetings at a beneficiary's home or at the settlor's suite of rooms at a hotel – even if these were occupied for long periods would not count as being a place of business for the trust company. There was a discussion as to whether restaurants could ever be a PE; the conclusion was that this was very unlikely. Meetings at adviser's premises unlikely to be an issue. HMRC said they were not trying to catch foreign beneficiary or settlor who visits UK to see his adviser but trustees or advisers who use the same hotel room for a while may be at risk.

Before the trustees could have a PE in the UK, there had to be a requisite degree of permanence. If this was missing, the venue could not be a PE, so it did not matter what was discussed or decided at such meetings. For example, the trustees could come to the UK and meet in a hotel - which they did not regularly use- and make decisions about distribution of trust corpus (a core activity) and this would not make the trust UK resident.

This Example revolves around various circumstances in which premises might be made available. The issue is whether the Jersey trustees have premises at their disposal as they clearly operated from a fixed base when in the UK. This is a example of frequency and degree. Thus, even if Tamar trustees do not have any legal right to occupy the room in the premises of CT, because that room is put at their disposal any repeated use of it where they have some discretion over the use would potentially create a PE. Paying a charge is more likely to suggest room at disposal. Even if it is found that the trust does have a fixed place of business PE then the trustee will be resident in respect of a particular trust where that trustee's core activities are carried out at that PE.

RESERVED POWERS TRUSTS

Example 25

Paragraph 10 of HMRC's Guidance refers to the "core" activities of a trust as including:

- the general administration of the trusts;
- the over-arching investment strategy;
- monitoring performance of those investments; and
- decisions concerning trust income and whether distributions should be made.

While this may be the case for a conventional "discretionary" trust, however, many (perhaps most) modern trusts will carve out these roles and may give them to different people. Sometimes this is at the request of the settlor who may not come from a culture familiar with trusts and may not want to put all his eggs in one basket. More commonly, however, professional trustees prefer that the investment function is carved out in the trust deed so that they do not assume any personal liability for poor investment performance.

Where this is the case the trust is usually referred to as a "reserved powers" trust or as a "directed" trust.

This needs to be clearly distinguished from the situation where the trust deed gives the powers to the trustees but allows them to delegate. That is NOT the case with a reserved powers trust. Instead the trust deed will simply not give those powers to the trustees in the first place. Some other person will retain or be given those powers.

The most common reserved power is over investments. Typical wording in the trust deed might say "*X shall be the Investment Director of the Trust and shall have power to direct the investment and reinvestment of the Trust Fund.... the Trustees shall comply with directions given by the Investment Director.....the Trustees shall have no function with regard to the investment and reinvestment of the Trust Fund which shall vest exclusively in the Investment Director....the Trustees shall have no liability whatsoever with regard to the investment and reinvestment of the Trust Fund*".

Typically this power might be reserved by the settlor. Occasionally the trust deed may give this power to a designated investment professional.

Other powers which may be reserved include powers over income and capital. Typical wording in the trust deed might say "*The Trustees shall pay the income of the Trust Fund to such one or more of the Beneficiaries.....as X shall from time to time direct.*" Or "*The Trustees shall hold the capital of the Trust Fund upon trust for such one or more of the Beneficiaries....as X shall revocably or irrevocably appoint*".

This power would again typically be reserved by the settlor. Occasionally it might be given to another family member (e.g. the eldest child).

It is common for one or other of these powers to be reserved. It is less common, but there are a number of examples, where both powers will be reserved. In such cases the trustee may have little or no discretion except in emergency situations (typically on the disability or death of the person with reserved powers). It is sometimes queried in such circumstances whether the trust is a "sham". But this is not the case. A "sham" exists where the parties intend a relationship other than that which is evidenced by the documents. Here the relationship is very clearly evidenced. Indeed what is more likely to be a sham is something which purports to be a discretionary trust but where the trustees never truly exercise that discretion! All leading trust counsel agree that provided the terms are clearly set out in the document, there is still a trust in such a situation.

In the light of this the following examples arise:

- (a) If the settlor has reserved the investment function to himself do HMRC consider the settlor to be an agency PE of the trustees if he habitually exercises the investment function while present in the UK? Our view is that this is NOT the case. The settlor cannot be a PE of the trustees' business because the investment function is not part of the trustees' business. The trustees' primary and overriding responsibility is to comply with the terms of the trust deed and the trust deed does not give the trustees the investment function in the first place.
- (b) As in (a), but the example is whether HMRC consider the settlor himself to be "acting as trustee in the course of a business which he carries on in the UK through a branch, agency or PE". Presumably not on the basis that (1) the settlor may be UK resident anyway (2) as confirmed in the *Armenian Patriarch v Sonsino* case, a person with investment powers is not "acting as trustee" (3) the settlor will not in any event be acting "in the course of a business" carried on "by him" and (4) the PE concept does not (we are told) apply to individuals and an individual cannot be a branch or agency of himself!
- (c) (d) as in (a) and (b) but the settlor has reserved rights over income and capital instead of the investment function.
- (e) (f) as in (a) and (b) but the settlor has reserved both the investment function AND rights over income and capital.

HMRC answers

If settlor has investment function under trust deed then it cannot be acting as agent of trustee.

To date HMRC weren't aware that they had seen any deeds of a reserved power trust. If they saw such as case then they said that they would obviously want to have a look at the documentation and may want to take further advice, so they were not willing to comment generally on whether a settlor may be treated as the trustee.

INDIVIDUAL NON-RESIDENT TRUSTEE

Example 26

Bill Ray moved to Guernsey 10 years ago. He used to practice as an accountant in the UK, but moved to Guernsey on his retirement. He acts as trustee of 25 trusts on an ongoing basis for which he charges a proper fee in order to supplement his retirement income. He accepts that he is "in business" of being a trustee, albeit that it is not a full-time occupation.

Bill Ray has no property in the UK (he sold his UK house when he retired). He visits beneficiaries / settlors of his trusts in the UK, sometimes in their own homes, but often at the Park Lane Hilton, London where he will meet them for lunch. Lunch is held in the restaurant rather than in a booked room.

- (a) Does the Park Lane Hilton constitute a branch or agency of Bill Ray's trust-business?
- (b) As above, but assume that Bill meets clients solely in their own homes or in restaurants (a different restaurant each time)?
- (c) As above, but Bill meets solely in clients' own homes?
- (d) In any event can Bill's own presence in the UK constitute a branch or agency? We take the view that while Bill could constitute an agency PE if his business were incorporated, he cannot be a branch or agency of himself. Do HMRC agree?

HMRC answers

- (a) No, there is no fixed place of business and no one is acting as Bill Ray's agent.
- (b) As above.
- (c) The premises are not really at Bill Ray's disposal so, again, there is no branch. (If however Bill Ray maintained an office or other fixed place of business in the UK the availability of that accommodation would be likely to constitute a UK branch.)
- (d) Bill Ray cannot be an agent of himself.

NON-RESIDENT SETTLOR

Example 27

Sheikh Abdullah is Saudi resident and domiciled. He has no home in the UK, but occasionally comes to the UK (for perhaps 15-20 days a year) for a variety of business reasons. The 15-20 days (midnights) are usually single visits (i.e. fly in one day, fly out the next), but occasionally he may stay in the UK for 2 nights. He stays in one of three main London hotels.

Sheikh Abdullah set up a (sharia-compliant) trust 8 years ago. The trustees are Big Bank Trustees SA who are based in Switzerland. Big Bank Trustees SA is a subsidiary company of Big Bank Inc which has offices throughout the world including an office in Berkeley Square.

The trust is a conventional discretionary (i.e. not reserved powers) trust.

The directors of Big Bank Trustees SA normally meet Sheikh Abdullah twice a year in Riyadh and once a year in Zurich. However, on one occasion, Sheikh Abdullah is so concerned at the investment performance of the trust that he demands an urgent meeting. As it happens he is on a business trip to the UK and one of the directors of Big Bank Trustees SA is also in the UK at the same time. So they arrange to meet at the Berkeley Square office. While there they formulate a new investment strategy for the trust.

Is the Berkeley Square office an PE of Big Bank Trustees SA?

HMRC answer

The same criteria as set out in Example 24 above apply to determine whether Big Bank Inc's office at Berkeley Square is a PE of the Swiss company trustees Big Bank Trustees SA.

A one off meeting, if that was the only meeting involving Big Bank Trustees SA at the Berkeley Square office, would lack the frequency necessary to establish the continuity needed for a PE.

If the Berkeley Square office were a PE, then because formulating a new investment strategy for the trust is core trust business, the trust will be UK resident. If, however, the director of Big Bank Trustees SA met the Sheikh at the Berkeley Square office of Big Bank Inc and listened to his views but did not take any decision or formulate the investment strategy at the offices but did so only when he returned to Switzerland, then no core trust business is being carried on through a PE in the UK and the trust is not UK resident.

See Examples 16 and 17 (on EBTs) for comparable situations.

INDIVIDUAL TRUSTEES

Example 28

Andrew is a qualified and practising solicitor in the Isle of Man. He is appointed as a named individual trustee of a discretionary trust created by a UK domiciled settlor. He is fully remunerated for his service of acting as a trustee (i.e. not merely reimbursed costs). The other trustee is a non-UK resident trust corporation. Andrew and the non-UK resident trust corporation are together the Trustees. The Trustees engage a UK based investment adviser on arm's length terms to advise them on the choice of investments and to manage those investments. The terms of engagement fulfil the agent of independent status exemption in relation to agency PE.

Can HMRC please confirm:

- (a) Whether, in these circumstances, the agent of independent status exemption only applies to the trust corporation because the PE concept is only relevant to corporate trustees; or
- (b) Whether, in these circumstances, the exemption is available because one of the Trustees is a corporate?
- (c) Whether they accept that the concept of branch or agency also recognises an exemption for an agent of independent status –see s10(6) TCGA (definition of branch or agency) with its reference to s82 TMA 1970 (now repealed but replaced with essentially similar legislation);
- (d) Whether HMRC intend to amend s10 (6) TCGA 1992 with a valid reference to the provisions that replaced s82 TMA 1970. “

HMRC answers

The independent agent exemption is relevant only to corporate trustee.

HMRC agreed that position in respect of reference to s82 TMA 70 in s10(6) TCGA 1992 is not immediately clear and they will clarify it.

AC/PCB

16.8.10

E: peter.bickley@icaew.com

THE TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. **Statutory:** tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. **Certain:** in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. **Simple:** the tax rules should aim to be simple, understandable and clear in their objectives.
4. **Easy to collect and to calculate:** a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. **Properly targeted:** when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. **Constant:** Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. **Subject to proper consultation:** other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. **Regularly reviewed:** the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. **Fair and reasonable:** the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. **Competitive:** tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99; see <http://www.icaew.co.uk/index.cfm?route=128518>.

© The Institute of Chartered Accountants in England and Wales 2010.

All rights reserved.

This document may be reproduced without specific permission, in whole or part, free of charge and in any format or medium, subject to the conditions that:

- it is reproduced accurately and not used in a misleading context;
- the source of the extract or document, and the copyright of The Institute of Chartered Accountants in England and Wales, is acknowledged; and
- the title of the document and the reference number (Trustee Residence; TAXGUIDE x/10) are quoted.

Where third-party copyright material has been identified application for permission must be made to the copyright holder.

www.icaew.com/taxfac and www.ion.icaew.com/taxfaculty/blog/