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DIPLOMA IN TAX LAW

‘Place of effective management’

A comparison between the South African
domestic tax concept and the International
tax concept

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Introduction:

The Revenue Laws Amendment Act, 2000 (Act number 59 of 2000) introduced a definition of a 'resident' in section 1 of the Act, which includes the term 'place of effective management' as one of the tests to determine the residence of a person other than a natural person (non natural person)¹. The question of whether a 'resident' other than a natural person has its 'place of effective management' in South Africa is important not only against the background of the numerous Double Taxation Agreements concluded by South Africa with its foreign counterparts, but also to determine whether a person other than a natural person is regarded as a 'resident' of South Africa for the purposes of the South African Income Tax Act number 58 of 1962.² In order to calculate a persons, other than a natural persons (for example; a company or trust) tax liability, you would need to determine its gross income. In calculating for instance, a company's gross income, one would first have to determine whether the company was a 'resident' of South Africa and thus subject to tax on its worldwide income and capital gains. It is important to note that the test of the 'place of effective management' to determine the 'residency' of a person, other than a natural person, is not the only test that exists. A person, other than a natural person is also a 'resident' in South Africa if it is; incorporated, established or formed in the Republic of South Africa. All these tests are subject to 1 exclusion which applies to any person who is deemed to be exclusively a 'resident' of another country for the purposes of a relevant Double Taxation Agreements. I am going to focus solely on the 'place of effective management' test for the 'residency' of a person, other than a natural person. The 'place of effective management' is a critical tax concept and yet it is not defined in the Income Tax Act. The South African Revenue Services (SARS) has issued an interpretation note on their view of the 'place of effective management'; however this interpretation differs from the view of international tax law. In this dissertation I will be analysing the South African domestic law and views surrounding the concept of the 'place of effective management'. I will then analyse the international tax law views of the concept of

¹ SAICA Legislation Handbook 2007/2008 *South African Income Tax Act*, Interpretation note number 6 -26th March 2002 (2007) 656.

² Brinker, Emil *International Tax-A South African perspective* (2004) 404.

the ‘place of effective management’ and then draw a conclusion of what the most accurate view of the ‘place of effective management’ is, based on the comparison of the two opposing views. I will further provide my opinion on whether South African courts will tend to follow the interpretation note as set out by SARS or international precedent in the future, when dealing with issues surrounding the ‘place of effective management’ when trying to determine the residence of a non natural person.

South African Domestic law analysis:

Section 1 paragraph (b) of the South African Income Tax Act number 58 of 1962, defines a ‘resident’ of a non natural person to be a;

‘Person (other than a natural person) which is incorporated, established or formed in the Republic or which has its place of effective management in the Republic’

As a result of the above definition, a person, other than a natural person, which has its ‘place of effective management’ in the Republic will be regarded as a ‘resident’ as defined.³ Therefore if a non natural person is regarded as a ‘resident’, it will be liable for tax in South Africa based on its gross income. The concept of the Gross Income of a ‘resident’ refers to a ‘resident’s’ worldwide income; this is defined in the act as follows:

‘In relation to any year or period of assessment [gross income] means;

- i. In the case of any resident, the total amount, in cash or otherwise, received or accrued to or in favour of such a resident, or*
- ii. In the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within or deemed to be within the Republic, during any year of assessment, excluding receipts or accruals of a capital nature, but including, without in any way limiting the scope of this definition, such amounts (whether of a capital nature or not) so received or accrued as are described*

³ SAICA Legislation Handbook 2007/2008 *South African Income Tax Act*, section 1 (2007) 294.

hereunder, namely... (read definition of Gross Income to see specific inclusions in Gross Income)

A 'resident' of a person other than a natural person, as defined, of South Africa will also be taxed on all of its capital gains. This is highlighted in paragraph 2(1)(a) of the Eighth schedule (which deals with the issue of the determination of Taxable Capital Gains and Assessed Capital Losses found in s26A of the Act) to the South African Income Tax Act which states that 'residents' are subject to tax in respect of their worldwide gains. This schedule specifically states that;

'subject to paragraph 97, this schedule applies to the disposal on or after valuation date of any asset of a resident'

The concept of 'effective management' was introduced into South African domestic tax law in 2000. Before this time South Africa was taxed on a source and deemed source basis. Prior to 2000 the South African Income Tax Act used concepts of 'managed and controlled' and 'managed or controlled'. The inconsistent use of the concepts 'managed and controlled', 'managed or controlled' and 'effectively managed' (when defining the residence of a person, other than a natural person) were addressed in the putting together of Interpretation Note number 6, of the South African Income Tax Act. A more uniform approach is now used whereby the 'place of effective management' is the only term referred to when defining a 'resident' of a person, other than a natural person. A key question arises, to what extent do the terms 'managed and controlled' and 'managed or controlled' differ from the 'place of effective management'? The comparison and analysis of these terms will be looked at in more detail later on in the paper, when foreign law concepts are discussed.

Interpretation Note number 6 was issued by SARS to provide some guidance on the meaning of the 'place of effective management'. The 'place of effective management' is not currently defined in the South African Income Tax Act; it further has no current supporting case law in South Africa. The quickest way for a legislative change or amendment to take full force and effect in South Africa is by

way of a Court setting a Precedent setting decision. This is yet to be done by the Court and as such foreign case law, legislation, academic opinion and the SARS interpretation note should be analysed to determine the interpretation of ‘effective management’. The Interpretation note issued by SARS does not amount to law and is merely a statement of SARS’ internal view on the concept.

With regards to the SARS interpretation note, it is important to note that SARS does not view the concept of ‘effective management’ to be the same as shareholder control or control by the board of directors rather; management refers to the company’s purpose and its business. It is very important to distinguish between the place where ‘central management and control’ is carried out by the board of directors, the place where decisions made by the board of directors are implemented and executed by the senior executives and managers and where they manage day-to-day business activities and lastly the place where day-to-day activities are carried out.⁴ SARS views the place where the business is managed on a day-to-day basis by senior executives and managers to be the ‘place of effective management’, irrespective of where the board of directors meet. Management of the business involves the implementation and execution of strategy decisions and policies made by the board of directors. The ‘place of effective management’ can also be referred to as the place where the entities overall group visions and objectives are implemented. Each entities management structures and methods of implementing director’s decisions, visions and goals will differ and thus each entity will encounter different difficulties in determining their ‘place of effective management’.⁵ Due to this fact the interpretation note as set out by SARS; (to determine the ‘place of effective management’) is simply a set of guidelines and are not rules cast in stone. Every case will be judged based on its own facts and circumstances. Some factors that are highlighted in the interpretation note to be used as guidelines when determining the ‘place of effective management’ include *inter alia*:

- Where the centre of top management is located,

⁴Supra footnote 1.

⁵ Supra footnote 1.

- the functions performed at the headquarters,
- where business operations are actually conducted,
- legal factors such as the place of incorporation, formation, establishment and registered office and public office,
- where senior managers responsible for the day-to-day management reside,
- the frequency of meetings of the entities directors or senior managers and where they take place,
- The scale of onshore as opposed to offshore operations.⁶

The place where management functions are carried out may be at 1 single location or may be at many locations. If the management functions are carried out at 1 single location, this will be the entities 'place of effective management'; this may or may not be the place where the entities day-to-day business operations and activities are carried out. Management functions may be carried out in more than 1 location due to advanced telecommunications such as telephone, internet and video conferencing. In these cases the 'place of effective management' will best be reflected in the place where the day-to-day operational management and commercial decisions taken by senior managers are actually implemented; in other words the place where business activities and operations are actually conducted or carried out. In many cases a business's activities and operations may be conducted from many locations and in such circumstances it will be necessary to look at the place where the strongest economic link to all other locations (within the group) is, to determine the 'place of effective management'. It is of utmost importance to note that there may only be 1 'place of effective management' per company.⁷ An entity whose 'place of effective management' is determined as being in the Republic and thus liable for tax in the

⁶ Supra footnote 1.

⁷ Supra footnote 1.

Republic will not be regarded as a 'controlled foreign entity' as defined in S9D of the South African Income Tax Act in relation to another resident.⁸

The concept of effective management is important for South African law purposes since it, *inter alia* determines whether a company is a tax 'resident' in South Africa and therefore subject to South African tax on its worldwide income and capital gains. The 'resident' definition specifically says that a person, other than a natural person, that is incorporated in South Africa is not a 'resident' if it is deemed to be a 'resident' of another jurisdiction by virtue of a Double Taxation Agreement. Tiebreaker rules exist in Double Taxation Agreements in order to help deal with situations where dual residency arises. An example of where dual residency arises is seen in the following scenario; if a company is incorporated in South Africa and is seen as a 'resident' for South African domestic law purposes, but in terms of the domestic law of the other jurisdictions it is also seen as a 'resident' of that State; in circumstances where South Africa has a Double Tax Agreement with that other state it is necessary to go to the tie-breaker test in the Double Taxation Agreement in order to determine whether it is a resident for Double Taxation Agreement purposes of South Africa or a 'resident' of the other state. This tiebreaker rule normally refers to where the company is 'effectively managed', but there are Double Taxation Agreements that exist that use other forms of tiebreaker rules.

Due to the fact that the 'place of effective management' is not defined in the South African Income Tax Act, it is necessary to turn to international law in order to ascertain the South African domestic law concept of the 'place of effective management'.

International law Analysis

General:

Generally, a 'resident' of a state is defined as a person or entity who under the laws of the state is liable to tax in that state due to its domicile, residency, place of

⁸ SAICA Legislation Handbook 2007/2008 *South African Income Tax Act*, Interpretation note number 6 -26th March 2002 (2007) 657.

management or any other criterion of a similar nature.⁹ There are two main principles under which countries tax income-source and residence. Income derived by a person or company may be taxed by a country due to the connection between the country and the generation of the income, this is income being taxed on a source basis. Income may also be taxed, no matter where it is earned in the world, purely because it has been earned by a 'resident', this is deemed to be income taxed on a residence basis. Most countries tax income on both a source and residence basis thus both 'residents' and 'non-residents' are taxed on domestic source income, tax residence rules applied in each state normally extend the taxation of 'residents' to their foreign source income.¹⁰ 'Residence' is an International tax concept (set of rules) that is used to tax both legal and natural persons of a country on their foreign source income, without 'residency' rules a country would only be able to tax most persons and companies on their domestic source income. All countries have 'residence tests' for companies (non natural persons) and individuals, these tests may be based on legal form and/or economic form. A major problem is that the 'residence' rules or the presumption of 'residence' is not uniform in all jurisdictions and if applied to a single set of facts they can led to distinctly different results and conclusions regarding the 'residence' of a company.¹¹ The tax 'residence' of a company is usually based on either place of incorporation, location of management or a combination of the two. The following table illustrates the different 'residency' rules applied in various different countries with regard to companies:¹²

<u>Country:</u>	<u>Tax residence test for companies:</u>
Australia	A company is an Australian resident if it is incorporated in Australia, or carries on business in Australia and has either its

⁹ Brinker, Emil *International Tax-A South African perspective* (2004) 404.

¹⁰ 'International Comparison of Australia's Taxes' available at: <http://comparitivetaxation.treasury.gov.au/content/report> [accessed 18 January 2010].

¹¹ 'Resolving dual residence of companies', available at: <http://www.knol.com> [Accessed 31 December 2009].

¹² Supra footnote 10.

	voting power controlled by resident shareholders or its central management and control in Australia.
Canada	A corporation is a Canadian resident if it is either managed and controlled or incorporated, in Canada
Ireland	<p>A company is an Irish resident if it is managed and controlled in Ireland.</p> <p>All new companies incorporated in Ireland are registered for tax purposes, however this does not apply to a company if:</p> <ol style="list-style-type: none"> 1. It (or a related company) carries on a trading activity in Ireland, and; <ol style="list-style-type: none"> i. It is under the control of persons resident in an EU member state or in a treaty country; or ii. Is (or is related to a company which is) quoted on an EU or treaty country stock market; or 2. It is regarded under a tax treaty as being a resident in a treaty country and not resident in Ireland.
Japan	A company is a Japanese resident if it is incorporated, or has its head office, in

	Japan.
Netherlands	<p>A company is treated as resident in the Netherlands if:</p> <ol style="list-style-type: none"> 1. It is incorporated under Dutch Law, generally an NV (public limited) or BV (private limited) company; or 2. It is actually situated in the Netherlands. A principal criterion is the location of the company's central management.
New Zealand	<p>A company is a New Zealand resident if it is incorporated in New Zealand, it has its head office in New Zealand, its centre of management is in New Zealand or the directors (acting as directors) exercise control of the company in New Zealand. The head office of a company means the centre of its administration management.</p>
Spain	<p>A company is a Spanish resident if it is incorporated in Spain, has its registered office in Spain or has its place of management there.</p>
Switzerland	<p>A company is a Swiss resident if it is incorporated, or if its place of effective management is, in Switzerland.</p>
United Kingdom	<p>A company is a United Kingdom resident if its central management and control is in the United Kingdom, or it is incorporated</p>

	in the United Kingdom.
United States	A company is a United States resident if it is incorporated under the laws of any state in the united states.

As can be seen from the above table; most countries rely on a combination of tests when defining a company as a 'resident' of their country. These tests include substance (economic form) and legal based tests. Countries that rely purely on legal based tests will find that many of their 'resident' companies will migrate to low tax countries/tax havens to reduce or avoid worldwide income taxation. Tax havens are not necessarily bad they arise due to fair competition amongst nations; countries with favourable tax regimes attract prosperous people and business. Some countries included on the list of tax havens include; Albania, Cayman Islands and Dubai.¹³ This problem of 'residents' migrating to tax havens has been experienced in the United States, which has had difficulties in recent times with companies moving to low tax countries, due to the extremely black and white test used by the United States to determine the 'residency' of companies. The United States relies solely on the incorporation test (legal test), which looks at where the company is incorporated or registered, to determine 'residency'. Most other countries include some form of management or control as a part of their company residence test.

Foreign case law:

Now that one understands the domestic terms used separately in various States abroad, I think it is important to obtain and examine foreign case law in order to try grasp a better understanding of the meaning of the 'place of effective management' as used domestically in South Africa.

United Kingdom case law:

The United Kingdom uses the common law test of 'central management and control' to decide on the 'residency' of a company. Understanding all the factors surrounding

¹³ 'Tax Havens' Available at: www.zyra.org.uk/taxhavens [Accessed 7 February 2010].

the term ‘central management and control’, may help one understand the term ‘place of effective management’. The term place of ‘central management and control’ has not been defined in any act and is ultimately a question of fact. ‘The word “central” implies that one should focus on the person who occupies the “pinnacle of power”, the directors, not the minor day-to-day managers.’¹⁴ The place of ‘central management and control’ is referred to as being the place where superior and directing authority occurs and not the place where in fact the decisions are carried out (Van Der Merwe ‘Residence of a Company-the meaning of “Effective Management”’ 2002 SA Merchant Law Journal 79 at 87)¹⁵. The place of ‘central management and control’ is where the directors of the company exercise their authority, which will generally be where the directors meet.¹⁶ At one stage, the United Kingdom concept of ‘central management and control’ meant the same thing as ‘place of effective management’. This was highlighted in the commentary of the 1977 OECD Model Double Taxation Convention. Her Majesty’s Revenue and Customs (HMRC), is a non-ministerial department of the British Government who are primarily responsible for the collection of taxes and the payment of some forms of state support.¹⁷ HMRC no longer believe that the concept of ‘central management and control’ means the same as ‘place of effective management’. The HMRC now believe from their point of view that the ‘place of effective management’ is generally understood to be the place where the head office is, not the head office in the sense of the registered office but the office where the finance director, sales and managing director and senior administrative staff are located. The place where the company’s records would normally be found is also referred to as the head office.¹⁸ The Inland Revenue (United Kingdom) believe that this new revised understanding of the concept of ‘place of effective management’ is more in line with the European Union

¹⁴ Brinker, Emil *International Tax-A South African perspective* (2004) 407.

¹⁵ Brinker, Emil *International Tax-A South African perspective* (2004) 406.

¹⁶ ‘The impact of the telecommunications revolution on the application of “place of effective management” as a tie breaker rule’, available at: <http://www.oecd.org> [Accessed 26 December 2009]

¹⁷ ‘Definition of HMRC’, available at: <http://www.wikipedia.com> [Accessed 25 January 2010]

¹⁸ Schwartz, Jonathan *Schwartz on tax treaties* (2009) 106.

countries tests for management than the test based on ‘central management and control’ was. The test of ‘central management and control’ referred to the place where superior and directing authority occurred. However they still believe that in the majority of cases the ‘place of effective management’ will be at the same place as the place of ‘central management and control’ as it is not that easy to completely split up the two meanings. The current administrative practice of the United Kingdom is contained in a statement of practice SP1/90, paragraph 22 which highlights the original view of the United Kingdom that ‘... in an agreement that treats a company as resident in a state which “its business is managed and controlled”, this expression means “the effective management of an enterprise”’. This view has been revised by the Inland Revenue, as stated above and it is now considered that the ‘place of effective management’ may differ to the place of ‘central management and control’, this could occur for example where a company is run by executives based abroad, but the final directing power rests with non-executive directors who meet in the United Kingdom. In such a case the company’s ‘place of effective management’ will be abroad (as this is where the key management and commercial decisions, necessary to run the business are made) however the company may be centrally ‘managed and controlled’ in the United Kingdom (and thus ‘resident’) in the United Kingdom- depending on the precise powers of the non executive directors. Finally, the HMRC has stated that ‘effective management’ will normally occur in the same country as ‘central management and control’ but may in some cases occur at the company’s true centre of operations where ‘central management and control’ occurs elsewhere.

The special commissioners of the **Indofood International Finance Ltd v JP Morgan Chase Bank NA** case indicated that when the Taxpayer and the Revenue were clashing over whether or not the ‘place of effective management’ differed from ‘central management and control’ in the **Wood v Holden** case they were completely missing the point:

‘The two concepts serve entirely different purposes. Central management and control determines whether a company is resident in the UK or not; place of effective management is a tie-breaker the purpose of which is to resolve cases of dual residence by determining in which of the two states it is to be found. Central management and control is essentially a one-country

*test; the purpose is not to decide where residence is situated but whether or not it is situated in the UK. Place of effective management on the other hand, must be concerned with what happens in both states since its purpose is to resolve residence under domestic law in both states, caused for whatever reason, which could include incorporation in one state and management in another, or different meanings of management applied in each state, or different interpretations of the same meaning of management applied in each state, or divided management.'*¹⁹

The commissioners went on to describe the meaning of 'effective';

*'...we believe 'effective' should be understood in the sense of the French effective (siege de direction effective) which connotes real. Accordingly, having regard to the ordinary meaning of the words in their context and in the light of their object and purpose we approach the issue of place of effective management as considering in which state the real management of the trustee qua trustee is found...'*²⁰

It was adopted that where 'realistic, positive management' occurs, this will be the 'place of effective management'.²¹

There are a number of foreign court cases that exist that provide some guidance on how to apply the term place of 'central management and control'. Most cases state that the place of 'central management and control' coincides with the place where the directors exercise their power and authority. The **De Beers consolidated Gold Mines (1906) AC 455** case decided that even though De Beers had its head office, worked and held its general meetings of shareholders in South Africa it was still a 'resident' of the United Kingdom. This was due to the fact that it was found that the real control of the company was done through directors meetings held in the United Kingdom and not directors meetings held in South Africa. Numerous Canadian cases have also stated that the place of 'central management and control' is where the

¹⁹Schwartz, Jonathan 'Schwartz on tax treaties' (2009) 109.

²⁰Schwartz, Jonathan 'Schwartz on tax treaties' (2009) 110.

²¹Supra footnote 20.

company ‘really keeps house and does business.’ Some other general factors that are in no way conclusive that have been taken into account when determining the ‘place of central management and control’ include:²²

- The place of incorporation,
- the place of residence of shareholders and directors,
- where the business operations take place,
- where financial dealings of the company occurs and,
- where the seal and minute books of the company are kept.

However the following cases illustrate how the above factors are not decisive and may be questioned and tested in some cases. In the **North Australian Pastoral Co Ltd v FCT (1946) 71 CLR 623** case, it was decided that the taxpayers company was a ‘resident’ where the company’s operations actually took place and not where the directors met. This was because the incorporation of the company, its undertakings and full company’s books were located where the business operated; the place where the directors met was out of pure convenience. In the **Malayan Shipping Co Ltd v FC of T (1946) 71 CLR 156**, the courts held that the company was an Australian resident as the managing director exercised complete ‘management and control’ from Australia, even though the company’s operations occurred abroad. In some cases, where the parent company (or controlling shareholder) makes its decisions may be relevant in deciding where the place of ‘central management and control’ is. This is illustrated in the **Unit Construction CO Ltd v Bullock (Inspector of Taxes) (1959) 3 ALL ER 831** case where three wholly owned subsidiaries located in Kenya were considered United Kingdom residents, as the parent company directors met in the United Kingdom, and important decisions made by the parent company directors overruled decisions made by subsidiary directors, situated in Kenya. With Reference to the Judgement in **Esquire Nominees Ltd v FCT 129 CLR 177**, it is indicated that the world ‘control’ within the term ‘central management and control’, must be actual control and not merely implied control. It was taken from this case that the ‘central

²²Supra footnote 16.

management and control' test is not a simple one and that its meaning could often hold many uncertainties.²³ Therefore one can use the foreign cases above and the meaning of 'centrally managed and controlled' as an aid to answer the question of whether the terms 'managed and controlled' and 'managed or controlled' mean the same as the 'place of effective management'. I think it is adequate to conclude that the place of 'management and control' generally refers to the place where the board of directors meet but can also be at the place where the main business activities occur or where superior decisions are made but not necessarily carried out. In comparison, the 'place of effective management', generally refers to the place where key management and commercial decisions necessary for the conduct of the business are in substance made and given (ordinarily be where the directors meet but not always). I think it is sufficient to say that the concept of the 'place of effective management' and 'management and control' should not be used interchangeably. The concept of the place of 'management and control' has a wide net and is not very specific in setting out its terms. If the two terms are used interchangeably, then an entity will in almost every case have more than one 'place of effective management' unless one limits the meaning of 'management and control' to only be where the highest level of decision making and management occurs. Once again, a huge downfall of testing for 'residency' based on the test of 'management and control' is that the place of 'management and control' can change on a daily basis due to the mobility of companies and the environment of advanced communications.²⁴

German case law:

According to the following German case law, the 'place of management' of an enterprise is where the management's important policies are actually made; **RFH RStB1. 804, 805 (1936); BFH 5 HFR 136, 137 (1965) and FG Hamburg, 33 RIW 724 (1987).**²⁵ The same conclusion was also found in Netherlands law in the following cases; **Hof Arnhem, Rolno. 737/1981 BNB 1985/36; Hof Amesterdam, Rolno. 23242 BNB 1986/42 and Hof den Haag, Rolno. 101/82, BNB 1984/279.**

²³ Supra footnote 22

²⁴ Brinker, Emil *International Tax-A South African perspective* (2004) 110.

²⁵ Vogel, Klaus Klaus Vogel, *Double Taxation Conventions*, 3rd Edition (1997) 262.

German case law also consistently states (with the most recent case being **BFH 44 DB 1429 (1991)**) that;

*‘the centre of management activities of a company generally is the place at which the person authorised to represent the company carries on his business-managing activities...a place from which a business is merely supervised would not qualify’.*²⁶

If the commercial and non commercial side of the business are managed at different places, the location of commercial management will be controlling as per **RFH RStB1. 779, 780 (1936)**.²⁷ If none of the above criteria work when applied to a set of facts then the top manager’s ‘residence’ will determine the ‘residence’ of a company in Germany. German law agrees with the South African Interpretation note in that there may only be 1 acceptable ‘place of management’, or ‘effective management’ in South Africa’s case. The Interpretation note as set out by SARS specifically says that the concept of ‘effective management’ is not the same as shareholder-control or control by the board of directors. German case law states that

*‘if he [shareholder or partner] can and does interfere with the usual conduct of the business, if he has arranged to be constantly informed of the various transactions, and if by his decisions he has a decisive influence on how current transactions are dealt with, that the controlling shareholder or partner can be said to be in charge of top level management’ (RFH RStB1. 706, 707 (1940); FG Dusseldorf, 32 EFG 535 (1984); Germany’s Double Tax Convention with Canada 1956; on this subject: Felix G., 1 DStR 421 (1963); Schroder, J. , 20 StBp 97 (1980)).*²⁸

Therefore, in Germany there are cases where a shareholder may be defined as the top level of management and thus his/her ‘residence’ will define the ‘place of effective management’

²⁶ Supra footnote 25.

²⁷ Supra footnote 25.

²⁸ Vogel, Klaus Klaus Vogel, *Double Taxation Conventions*, 3rd Edition (1997) 263.

Identifying with the concept of the 'place of management' will help one further understand the concept of 'place of effective management'. 'Place of management' is another non-natural persons (company) 'residence' test adopted by countries such as Switzerland, Germany and the Netherlands. The Swiss make it clear in their domestic law that there is a difference between the 'place of effective management' and merely administrative management or decision making by executive bodies. Professor Klaus Vogel, who was a German academic expert on the aspects of international taxation and in particular tax treaties and was regarded as an authority on the interpretation of Double taxation treaties²⁹, suggested that the 'place of effective management' and the 'place of management' have similar meanings under the German domestic law. German case law states that a 'place of management' is the place where management's important policies are actually made. Vogel again suggests that 'what is decisive is not the place where management's directives take effect, but rather the place where they are given.'³⁰ It is the centre of top level management, the place where the person who represents the company carries on his business; be it the director, manager or controlling shareholder. However where a business is merely supervised does not qualify as a centre of top level management.³¹

The Organisation for Economic Co-operation and Development (OECD)

General overview:

The Organisation for Economic Co-operation and Development (OECD) was formed to bring together the governments of over one hundred countries from around the world who are committed to democracy and the market economy. Twenty countries originally signed the convention on the Organisation for Economic Co-operation and development on 14 December 1960 and since then ten other countries have become members of the organisation. South Africa is not a member of the OECD. This organisations mission is to support sustainable economic growth, boost employment, raise living standards, maintain financial stability, and assist other countries

²⁹ 'Professor Klaus Vogel', available at: <http://fitindia.org> [Accessed 6 February 2010].

³⁰ Supra footnote 25.

³¹ Supra footnote 25.

economic development and to contribute to growth in world trade.³² However, none of the guidelines set out by the OECD are binding on any of the member states. The OECD provides a platform whereby countries can compare policy experiences, look for answers to common problems and identify good practice and co-ordinate domestic and foreign policies.³³ The OECD put together a model tax convention (treaty) to help alleviate the difficulties that arise with regards to dual residency of companies; that occurs due to the fact that individual countries apply different domestic rules when determining the ‘residence’ of a company. The convention was formed in order to avoid double taxation on companies. The model convention sets out a format on what the OECD sees as a comprehensive outline of what a double taxation treaty should look like. This convention provides a basis off of which countries can form Double Taxation Agreements amongst themselves, countries can deviate from this as much as they wish and exclude certain points they don’t think are relevant or important or include important points they feel have been omitted from the OECD format. I am going to focus on chapter 2, article 4, paragraph 3 of the convention: The definition of the ‘residence’ of a person other than an individual. The OECD uses article 4 paragraph 1 to define a resident of a contracting state as;

‘for the purposes of this Convention, the term “resident of a contracting state” means any person who, under the laws of that state, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that state and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that state in respect only of income from sources in that state or capital situated therein.’³⁴

Article 4 paragraph 3 then states;

³² ‘The OECDs mission statement’, available at: <http://oecd.org> [Accessed 26 December 2009].

³³ Supra footnote 32.

³⁴ ‘Articles of the model convention with respect to taxes on income and capital’ available at: <http://www.oecd.org> [Accessed 31 December 2009]

‘where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both contracting states, then it shall be deemed to be a resident only of the state in which its place of effective management is situated.’³⁵

Most instances of double taxation will arise as a result of resident-source jurisdictional conflicts. However double taxation can also arise from residence-residence conflicts where both conflicting states treat a company as a ‘resident’ under their domestic laws and thus the company is fully liable for tax in both countries. There are three main reasons why dual residence may arise with regards to a company; the first being that a single set of criteria are applied to one set of facts (i.e. if dual incorporation arises as a criteria), secondly that different interpretations are applied to one set of criterion and lastly due to different criteria being applied.³⁶ Article 4 paragraph 3 deals with residence-residence conflicts.

OECD commentary:

As seen above, Article four, paragraph three of the OECD Model Tax Convention introduced the tiebreaker rule, based on the place of effective management, which lays out guidelines with regards to determining the ‘residence’ of a person other than a natural person, where under the domestic laws of both contracting states the entity is ‘resident’ in both states. Most Double Taxation Agreements use the effective management rule as set out by the OECD as their tie-breaker provision. The commentary does not accept a tiebreaker rule based on purely formal criteria such as registration. The commentary rather sides with testing where the entity is actually managed, the intention is to use where the main decisions are in fact made as a criteria. These rules seek to determine a single residence of an entity for tax treaty purposes in cases where two different states apply different tests to determine residency. An example is; that an entity can be defined as a resident under both

³⁵ Supra footnote 34.

³⁶ ‘Resolving dual residence of companies’, available at: <http://www.knol.com> [Accessed 31 December 2009]

contracting states if it is domiciled in state A and has its place of effective management in state B (based on the domestic laws applied in each state) in this case the tiebreaker rules can be applied to find a single residency in only one state.³⁷ If an entity, based on the above criteria is a resident of both contracting states then the tiebreaker rule deems the entity to be a resident only of the state in which its 'place of effective management' is situated. However where a Double Taxation Agreement exists between two countries, those countries may decide to use a different test to define 'residency' as opposed to the test of the 'place of effective management'. For instance; in the South African/ United States of America Double Taxation Agreement, a company is deemed to be a 'resident' of a state under the laws of which it is created or organised in the event of potential dual residency.³⁸

The OECD model takes a different view on the definition of the 'place of effective management' compared to the view that SARS takes on in its Interpretation note (number 6). Article 4 paragraph 3 of the OECD model does not define the term 'place of effective management' and thus allows all taxing jurisdictions to interpret the concept in accordance with their own domestic law. Many commentators of the OECD have taken domestic terms such as 'central management and control' and 'place of management' into consideration when considering the meaning of 'place of effective management'. Paragraph 24 of the OECD commentary provides some guidance on the meaning of the 'place of effective management' and reinforces that the determination of the 'place of effective management' is a question of fact and states that:

'...the place of effective management is the place where key management and commercial decisions that are necessary for the conduct of the enterprises 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 enterprise as a whole are determined; however, no definite rule

³⁷ 'Draft contents of the 2008 update to the model tax convention 21st April- 31st May 2008' available at: <http://www.oecd.org> [Accessed on 6 January 2010].

³⁸ Brinker, Emil *International Tax-A South African perspective* (2004) 405.

*can be given and all relevant facts and circumstances must be examined to determine the place of effective management. An enterprise may have more than one place of management, but can have only one place of effective management at any one time.*³⁹

If the function of making high level decisions is performed by a person or a group of people other than the board of directors, it must then be considered where, that person or group of people make their decisions as this could be considered as the 'place of effective management'. It must be stressed that, all relevant factors will have to be looked into on a case by case basis when determining an entities 'place of effective management'. In a discussion paper produced by the OECD, dated February 2001; the OECD indicated that some of the relevant factors that have been taken into account by the courts in the past, when determining the 'place of effective management' include:

- Where the centre of top level management is located,
- where the business operations are actually located,
- legal factors such as the place of incorporation, the location of the registered office and public office, etc,
- where controlling shareholders make key management and commercial decisions in relation to the company,
- where the directors reside.⁴⁰

Many scenarios will exist that will make the determination of the 'place of effective management' very difficult. 1 such scenario that may be problematic is when there is a holding company and a subsidiary. The United Kingdom gives its opinion on such a scenario in the United Kingdom Practice Note 6/83 which states the following:

'However, in cases where the parent usurps the functions of the board of the subsidiary...or where the board merely rubberstamps the parent company's

³⁹ Supra footnote 22.

⁴⁰ Supra footnote 38.

decision without giving them any independent consideration, the revenue will draw the conclusion that the subsidiary has the same residence for tax purposes as its parent.’⁴¹

There are arguments that exist, that state that due to the fact that subsidiaries are merely conduits, they do not have any place of effective management.⁴² What is most important to note is that there is an international tax concept of effective management; however there are variations on this concept in terms of various jurisdictions having a slightly different view of the concept of effective management.

Understanding and interpreting the ‘place of effective management’ (being the tiebreaker rule, based on the OECD guidelines) can be very difficult when a state tries to align the meaning with their own domestic laws. The OECD commentary only refers to the place where executive decisions are made as being the place of effective management and not merely where they are carried out. Nevertheless, there are views that state that management’s decisions cannot be effective without implementation and thus the implementation of managements decisions should be taken into account, thus further complicating the interpretation of the concept of the ‘place of effective management’. Many views and opinions over the concept of the ‘place of effective management’ have leaded a number of countries to make their own observations on this concept and thus come to their own conclusions on the matter of how to interpret their ‘place of effective management’. The different interpretations amongst nations becomes very significant in terms of the OECD model tax treaty, as the treaty states that any 1 enterprise may have more than 1 ‘place of management’ but may not have more than 1 ‘place of effective management’. It appears that most of the international opinions favour the definition of the ‘place of effective management’, as being the place where decision making occurs at a high level of management as opposed to where day-to-day operations occur (South Africa’s interpretation). However it is not clear whether this ‘place of effective management’ is where the decisions made by senior managers includes

⁴¹ Brinker, Emil *International Tax-A South African perspective* (2004) 407.

⁴² Supra footnote 41.

only the making of strategic decisions as opposed to a combination of making these strategic decisions and carrying them out through implementation. It has been highlighted by the OECD model that in an event of uncertainty the place where the decisions are merely taken should prevail.⁴³ Although one cannot all together exclude the place where executive management decisions are implemented, but as there can only be one 'place of effective management', the place where decisions are made as opposed to where they are implemented will be decisive.

There are many different levels of management to a company and each tiebreaker test focuses on a different level or form of management when trying to determine the 'residency' of a company. Firstly, there is shareholder type control which is not a part of effective management; shareholder control is merely the rights that shareholders have in a particular company due to the shares that they hold in that company by way of an investment. Secondly, effective management refers to the high level strategic management of a company that occurs in terms of the OECD concept. Then there is management and control which is a more formalistic view and typically examines, for example, where the board of directors have their meetings. Lastly you have day-to-day management. SARS seems to try to put all of these meanings into the concept of effective management whereas the OECD concept focuses more on the strategic high level management and does not have reference to the day-to-day management or implementation of day-to-day decisions. In this regard, Van Der Merwe observed in his article titled '*Residence of a Company-the meaning of effective management*' that; 'The fact that our [South African] definition of residence expressly favoured the treaty definition instead of "management and control", indicates a desire for a different concept, which is in line with the perceived shift in the United Kingdom. I believe that the place of effective management can include the place where the day-to-day management and administration are performed, unlike the concept "central management and control", which refers to the place where the superior policy and strategic decisions are made.'⁴⁴

⁴³ Brinker, Emil *International Tax-A South African perspective* (2004) 408.

⁴⁴ Supra footnote 43.

Double Taxation Agreements:

Many tax treaties exist between countries on a bilateral basis to prevent double taxation⁴⁵, thus states come to an agreement to not tax any amount of income twice that a person or firm domiciled in one country earned in another country.⁴⁶ Double taxation without a Double Taxation Agreement arises due to different domestic laws being applied in the different contracting States. All treaties following the colonial pattern refer to 'management and control' as opposed to 'effective management' when defining 'residency'. A key point highlighted above, is that these two concepts should not be used interchangeably. The OECD refers to the 'place of effective management' as being the deciding factor (tiebreaker rule) on where an entity is 'resident' however the 'central management and control' concept has been adopted as the tiebreaker rule in English-speaking countries and similarly the 'place of management' concept has been adopted by some continental countries.⁴⁷ No guidelines or commentary has ever been published to draw a clear distinction between all these meanings, however all that the OECD has recognised is that each meaning is based on the experience of the countries concerned.

I will now look at three Double Taxation Agreements that South Africa has with its foreign counterparts. I will pay particular attention to the United Kingdom-South Africa Double Taxation Agreement and to the terms used domestically in each state and then to the tests used when dual residency of a non natural person arises. I will then briefly look at the tiebreaker tests used in the South African-United States and South African-Nigeria Double Taxation Agreements.

South Africa-United Kingdom Double Taxation Agreement:

⁴⁵ 'Definition of double taxation agreement', available at: <http://www.wikipedia.com> [Accessed 25 January 2010].

⁴⁶ 'Definition of double taxation agreement', available at: <http://www.businessdictionary.com> [Accessed 25 January 2010].

⁴⁷ Schwartz, Jonathan 'Schwartz on tax treaties' (2009) 110.

When comparing the domestic tests applied in the United Kingdom and South Africa, we find that the United Kingdom test for ‘residency’ of a company by looking for the place where ‘central management and control’ occurs whereas South Africa look for a company’s ‘place of effective management’. In South African terms this is the place where the business is managed on a day-to-day basis by its senior executives, the place where the businesses overall visions and objectives are implemented. Thus the United Kingdom define ‘residency’ to be the place where superior decisions are made, whereas South Africa defines ‘residency’ as the place where a business is managed on a daily basis. There is very little authority on the application of the tiebreaker rule as set out in the OECD Tax Model Treaty, the ‘place of effective management’ in United Kingdom law. These conflicting ideas of ‘residency’ brought about the South African-United kingdom Double Taxation Agreement that sought to iron out conflicts that could occur when the issue of dual residency arises. Neither state defines a ‘resident’ of a company domestically in the same way as the OECD would define the ‘residence’ of a company, as per the definition of the ‘place of effective management’ in the OECD commentary. In accordance with the United Kingdom-South African Double Taxation Agreement⁴⁸, the term ‘resident of a contracting state’ is defined in paragraph 1 of Article 4 as;

*‘any person who, under the laws of that state, is liable to tax therein by reason of that person’s domicile, residence, place of management, place of incorporation or any other criterion of a similar nature, and also includes that state and any political subdivision or local authority thereof.’*⁴⁹

Article 4 Paragraph 3 of this treaty then states the following:

‘where by reason of the provisions of paragraph 1 of this Article a person other than an individual is a resident of both contracting states, then it shall

⁴⁸ ‘INTM120070-Company Residence: ‘Treaty Non Resident’ companies’ available at: <http://www.hmrc.gov.uk/manuals/intmanual/INTM120070.htm> [Accessed 18 January 2010].

⁴⁹ ‘Double Taxation Agreements: South African-United Kingdom Double Taxation Treaty’ available at: <http://www.sars.gov.za/home.asp> [Accessed 25 January 2010]

*be deemed to be a resident solely of the state in which its place of effective management is situated.*⁵⁰

The definition of a permanent establishment is mainly the same as that set out in the OECD framework but the explanatory memorandum of the South African-United Kingdom Double Taxation Agreement states that the definition given of a 'permanent establishment' in the treaty departs from the OECD model in certain areas and expands on the list of fixed places of business. Therefore an entity that has its 'permanent establishment' or 'deemed permanent establishment' in accordance with the South African-United Kingdom Double Taxation Agreement in either South Africa or the United Kingdom will be deemed to be a 'resident' of that state and thus liable to tax in that state. The annexure to the South Africa-United Kingdom Double Taxation Agreement points out that all of the United Kingdom's recent Double Taxation Agreements follow the approach as adopted in the OECD's Model Tax Convention on Income and on Capital. As can be seen from the comparison of the different domestic laws applied in each state and the treaty then agreed to between the states, there are many concepts and situations that will be left open to interpretation by the courts on a case by case basis. Nonetheless this Double Taxation Agreement has kept in line with the OECD framework provided besides a few deviations as highlighted above.

South African-United States of America Double Taxation Agreement:

The United States of America domestically defines a company as a 'resident' if that particular company is incorporated under any of the laws of the United States; this is very different to South Africa's day-day-day management test for 'residency' of a non natural person. When looking at the South African- United States Double Taxation Agreement, Article 4, paragraph 3 states that;

*'whereby reasons of the provisions in paragraph 1 a company is a resident of both contracting states, then it shall be deemed to be a resident of the state in which it was incorporated'*⁵¹

⁵⁰ Supra footnote 49.

Article 4 paragraph 4 then further states that;

*‘whereby reason of the provisions of paragraph 1 a person other than an individual or a company is a resident of both contracting states, the competent authorities of the contracting states shall by mutual agreement endeavour to settle the question and determine the mode of application of the convention to such person’*⁵²

A person other than an individual or a company referred to in article 4, paragraph 4 means a partnership, estate or trust. The reason for the use of mutual agreement as a tiebreaker rule is because under United States tax law there are no standard attachments for the tax liability of partnerships, estates and trusts and thus each dual residency problem will have to be solved on a case by case basis.⁵³ This Double Taxation Agreement is one example of where the contracting states have chosen to deviate from the OECD model. The tiebreaker rule illustrated above is the ‘place of incorporation’ and not the ‘place of effective management’.

South Africa-Nigeria Double Taxation Agreement:

The Double Taxation Agreement that exists between South Africa and Nigeria states in article 4, paragraph 3 that;

*‘where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both contracting states, the competent authorities of the states shall settle the question by mutual agreement and determine the mode of application of the agreement to such person.’*⁵⁴

⁵¹ ‘Double Taxation Agreements: South African-United States of America Double Taxation Treaty’ available at: <http://www.sars.gov.za/home.asp> [Accessed 25 January 2010].

⁵² Supra footnote 51.

⁵³ Vogel, Klaus Klaus Vogel, *Double Taxation Conventions*, 3rd Edition (1997) 264.

⁵⁴ ‘Double Taxation Agreements: South Africa- Nigeria Double Taxation Treaty’ available at: <http://www.sars.gov.za/home.asp> [Accessed 25 January 2010].

This provision leaves a lot open to interpretation, many judges in these states will find that every case will have to be judged individually and domestic and international views on 'residency' will have to be taken into account when coming to a conclusion of the 'residency' of a dual residence company.

General:

Telecommunications industry and its effect of the place of effective management:

With specific regard to the telecommunications industry, the terms 'place of central management and control' and 'place of management' lead us to believe that the 'place of effective management' will ordinarily lie with the directors, this may not always be the case especially if strategic powers and decision making rests with others. Another common term used amongst all countries when referring to 'residence' is the place where top level management occurs, in the past this would normally coincide with the place where the company was incorporated, where business activities are conducted and where directors and senior managers reside and thus it would be rare to find that a company is 'resident' in more than 1 country when this term is used. Nonetheless technology is fundamentally changing the way people run their businesses. Due to sophisticated telecommunications systems and efficient and cheap transport, people no longer need to be in one place to run their business. The decentralisation of business hubs has increased the incidences of dual 'residency' of companies and made the application of the term of the 'place of effective management' a more and more significant term in the tax world.⁵⁵

In a modern world it may be difficult to apply all the factors set out by the OECD in trying to find which state a company is a 'resident' of. In theory the 'place of effective management' should always produce results that reflect the true policy intention of the tiebreaker rule, as the test for the 'place of effective management' is one of substance over form. This will not always be the case with evolving technology and improved telecommunications and transport; a business may well find itself in a predicament where it has more than 1 'place of effective management'. The OECD Model specifically distinguishes between a 'place of

⁵⁵ Schwartz, Jonathan 'Schwartz on tax treaties' (2009)110.

management' and a 'place of effective management'; an entity may have more than 1 'place of management' but can only have 1 'place of effective management'. There have been increasing debates of late that state that an entity may have more than 1 'place of effective management' at any time due to the emergence of the digital workplace and in the context of e-commerce. Technology now allows directors, living in different states to convene a board meeting through telephone conferencing, video conferencing and through communication via email. Therefore the directors (or any senior managers) are not meeting in 1 specific location to make high level decisions and thus more than 1 'place of effective management' exists at any given point in time.⁵⁶ However, because more than 1 'place of effective management' is not allowed, each jurisdiction from which the directors are located and sit and make decisions is referred to as a 'place of management'. It will be very difficult if not impossible for one to point out which 'place of management' is the 'place of effective management'. Factors that will complicate determining the 'place of effective management' include;

- If the residence of directors are used to determine the residence of the company; directors may stay in different countries,
- if a company is listed on more than one stock exchange,
- increased numbers of transnational businesses, will increase the incidence of mobile places of effective management,
- directors who constantly make decisions while travelling on improved global transport,
- where the board of directors arrange to meet at different places yearly, on a rotational basis.⁵⁷

⁵⁶ 'Resolving dual residence of companies', available at: <http://www.knol.com> [Accessed 31 December 2009].

⁵⁷ Supra footnote 16.

Suitable tiebreakers that resolve dual residency:

I think it is sufficient to say that in order to deal with residence-residence conflicts, a well understood tiebreaker needs to be put into place to avoid double taxation. In order to be an effective tiebreaker, it must only assign 'residence' to one contracted state. If when using the 'place of effective management' concept to test for 'residency' (as defined by the OECD) in a Double Taxation Agreement does not result in only one contracting state being defined as a 'resident', then the contracting states should look at either:

- Replacing the 'place of effective management test' or concept. For example with the 'place of incorporation' (there are some rare cases where this test could result in dual residency), where directors reside or the place where the economic nexus is the strongest;
- refining the 'place of effective management' test. For example, giving certain factors more weighting than others or making a determination on the basis of predominant factors;
- applying more than one test in a set hierarchy. For example, using the 'place of effective management' as the first test, 'place of incorporation' as the second test and so on or;
- applying a combination of all mentioned above.⁵⁸

Every option above will have its pro's and con's and these need to be carefully looked into when states decide on a tiebreaker rule to be used. An efficient tiebreaker rule that will produce the 'residence' of a company in only one state is what states should aim to achieve when drawing up Double Taxation Agreements. In most cases the 'place of effective management' as a tiebreaker rule will provide the right result, however what is needed is a tiebreaker rule that will work in all cases where dual 'residence' occurs. This will only occur when states take the 'place of effective

⁵⁸ Supra footnote 16

management' tiebreaker and adjust it to meet their own particular needs (however in some cases no adjustment will be necessary).⁵⁹

Conclusion:

In conclusion, there is no domestic law concept of 'effective management' under South African law as we do not have any case law or statutory definitions of this concept. The only guidance provided to company's who have 'residency' problems or queries, is interpretation note 6 as set out by SARS. It is therefore necessary to have reference to persuasive influence of foreign jurisdictions and opinions.

SARS and thus South Africa takes on the view that the 'place of effective management' is where a business is managed on a day-to-day basis by senior executives and managers, irrespective of where the board of directors meet. It is the place where the company's overall group visions and objectives are implemented. South Africa is choosing to focus mainly on the lowest level of management, when finding an entities 'place of effective management' however high levels of management will naturally form part of this every day management. SARS has been 'clever' in converging various concepts and levels of management into the concept of 'effective management' in an attempt to catch everything into one net under the concept of the 'place of effective management'.

Various foreign jurisdictions use the term 'central management and control' to define the 'residency' of a non natural person. This term focuses mainly on the highest level of strategic management. The place of 'central management and control' is where superior and directing authority occurs, not where decisions are carried out. It is generally the place where the board of directors meet and where key management and commercial decisions are made.

The 'place of management' is another term used abroad when defining the 'residence' of a non natural person. This term refers to the place where management's important policies are made and where directives are given. The centre of top level management is focused on when using this concept.

⁵⁹ Supra footnote 16

The OECD commentary provides a good basis of interpretation to the definition of the 'place of effective management'. The OECD guidelines state that the 'place of effective management' is where key management and commercial decisions necessary for the conduct of the entire business are in substance made. The OECD commentary focuses on the strategic high level of management of a company when defining the 'place of effective management'. The OECD opinion of the meaning of the 'place of effective management' holds a lot of importance as this OECD concept is often used as a treaty concept.

As has been pointed out above, various jurisdictions use different terms and tests when determining whether a company is a 'resident' of their country. Concepts such as; 'management and control', 'central management and control' and 'place of management' are concepts used in various jurisdictions to define the 'residence' of non natural persons. All these concepts have a lot in common yet cannot be used interchangeably because when one dissects each meaning they will find that small differences do exist amongst the definitions of the concepts. The biggest difference is what level of management is being focused on and whether the focus of the concept is on where decisions are made, implemented or both. The OECD have said that if there is a situation in question, on whether one should focus on where decisions are made or implemented, one should rather focus on where decisions are made. Using these terms interchangeably will often result in a company having more than 1 'place of effective management'. The telecommunications revolution is also overlapping these concepts as many forms of management are occurring at varied locations. Often, nowadays a high level decision will be made in more than 1 jurisdiction and thus more than 1 'place of effective management' will exist. However, both the OECD and SARS agree that there can only be 1 'place of effective management'.

I think, in the future when South African courts have to deal with 'residency' disputes of non natural persons they will place a lot of reliance on international precedent and opinion when coming to a conclusion on what the true definition of the 'place of effective management' is. South Africa has little to no experience on the matter and no cases to fall back on. The OECD is a very reputable and well respected organisation; there are many great nations that are members of the OECD. The guidelines they provide as an aid to nations who find difficulty in defining the

concept of the 'place of effective management' hold a lot of precedence and will carry a tremendous amount of weighting in a judge's decision. Most international law tends to agree with the OECD, in that the 'place of effective management' is where the high level strategic decisions occur and activities are carried out. For all of the above reasons, I think it is inevitable that when courts examine the concept of the 'place of effective management', they will examine a more high level strategic management test as opposed to a day-to-day management test. It seems that the only reason SARS used the day-to-day management concept when dealing with the 'place of effective management' was to define as many companies as they could as South African 'residents' and thus be able to claim the maximum amount of tax possible, without losing revenue (in the form of tax) to other jurisdictions. If SARS placed a more specific definition to the 'place of effective management' they would run the risk of companies planning their activities in such a way that they become 'residents' of tax havens and thus avoid paying tax in South Africa. SARS is taking a chance by giving the 'place of effective management' such a broad meaning, the South African courts will take this into account when coming to a decision of the 'residency' of a non natural person.

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Research dissertation presented for the approval of the Senate in fulfillment of part of the requirements for the qualification for the Postgraduate Diploma in Tax Law in approved courses and a minor dissertation. The other part of the requirements for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of the Postgraduate Diploma in Tax Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations

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