

# Appeal lost: Foreign companies were tax residents of Australia

The Full Bench of the Federal Court declined an appeal by multiple foreign companies against an assessment based on them being Australian tax residents.

The foreign companies included:

- Hua Wang Bank Berhad (offshore bank incorporated in Samoa);
- Bywater Investments Limited (incorporated in the Bahamas);
- Chemical Trustee Limited (incorporated in the UK); and
- Derrin Brothers Property Limited (incorporated in the UK).

Documents provided in evidence indicated that all of the companies were ultimately owned and controlled by an accountant based in Sydney. Each company made profits buying and selling ASX listed shares. If they were non-resident and the shares were held on capital account then no tax would have been due.

The Tax Office previously issued assessments for the years between 2000 and 2007.

Despite Board meetings being held in the relevant jurisdiction, the Full Bench held that the central management and control of the companies was “where the real business of each of the taxpayers” was undertaken and that was in Sydney by the accountant.

The companies have sought special leave to appeal to the High Court.

## Residency of companies

Under Australian tax legislation, a company will be a resident of Australia if it is registered here or its central management and control is exercised here. Under most Double Tax Agreements, where a company is resident of both of the treaty countries, tax residency will be deemed (or tie-broken) to be the place of effective management.

The place of “central management and control” and “effective management” are similar concepts and are the places where “real” decision making happens for the company.

With increasing international operations, both large and small corporate groups need to be careful of the location where decision making, including at Board meetings, takes place. Careful minutes and other records should be maintained.

The real business of a company will vary depending on its operations. Sometimes the real business is more strategic and other times it is more operational or of a trading nature.

*Bywater Investments Limited and Ors v FCT 2015 ATC 20-549*

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