

## SPV'S AND CONTROL

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The question whether one company “controls” another is a question that arises in different contexts for tax purposes. Most commonly it arises in determining the availability of the small companies rate of corporation tax where the benefit of the lower rate is reduced if companies are associated. For this purpose companies are associated if one controls the other or both are under the control of the same person or persons. To determine whether this is so the relevant statutory definition is now found in s.450 CTA 2010<sup>1</sup> where “control” means control at shareholder level<sup>2</sup>. The issue of “control” can also arise in the context of company residence where the historical test has always been that a company is resident where control and management over its affairs is found. In this situation control and management is a reference to control at board level.

The issue of who has control over a company can arise most particularly as regards SPV’s. Companies may be set up for a particular purpose where it is envisaged that they will go along with the wishes of another company or individual. In what circumstances will that other company or individual be regarded as having control over the company in question?

The issue referred to arose recently and was considered by the Court of Appeal in *DB Group Services (UK) Ltd v. HMRC*<sup>3</sup>. That case involved a scheme to avoid income tax and national insurance contributions on bankers’ bonuses. Instead of bonuses being paid in cash, employees received shares subject to restrictions. An exempting provision had the effect that no charge that would otherwise arise on the lifting of the restrictions would arise so long as various conditions were met, in particular that the company in which the shares were held was not an “associated” company of the company

employing the employees in question.<sup>4</sup> The employer company in that case was the Appellant and the company in which the shares had been issued was Dark Blue Investments Ltd (“Dark Blue”). The company with the ostensible control of Dark Blue was Investec Ltd, which company played a role in administering the scheme and made a market to buy the shares held by employees when they decided to sell them.

HMRC argued that the Appellant had “control” over Dark Blue. Investec Ltd, they argued, simply did the bidding of the Appellant and as a result the Appellant could properly be said to control Dark Blue. This argument the Court of Appeal refused to accept.

In circumstances such as those in issue the Court of Appeal did not lay down any general test as to when it would be correct to disregard the ostensible control of one company and attribute it to another. It certainly did not say that such control will only exist if one person can compel another to act in accordance with its directions. The Upper Tribunal considered that such control would exist if one company could in practice be relied on to act in accordance with the others wishes without giving any independent thought to the merits of any course of action proposed. The Court of Appeal did not expressly agree or disagree with this approach.

The arrangements in DB Group Services involved Investec Ltd acting pursuant to a series of arrangements that were preordained and involved a co-ordinated course of action between the participants. The Court of Appeal said however that

“It does not... begin to follow from this that [the Appellant] was in relevant control of Investec. If A Ltd proposes to B Ltd, an unconnected and independent company, a co-ordinated course of action with a view to achieving a commercial end to the benefit of both, and B Ltd agrees to the proposal and co-operates in its implementation, it is beyond my comprehension why

such state of affairs should be thought to justify the inference, that in playing its own part in the operation, B Ltd is to be regarded as being “controlled” in what it does by A Ltd. The proposition is wrong. B Ltd will, by inference, want to take part, and will do so. But there will ordinarily be no basis for an inference that the decisions it makes en route to the ultimate goal will be decisions it makes other than independently and in its own interests, in achieving the proposed end.”

A not dissimilar approach was adopted by the Court of Appeal in the earlier case of *Wood v. Holden*<sup>5</sup> which concerned the residence of a company claimed to be resident in the Netherlands. The company was set up as part of a scheme to avoid capital gains tax. A separate Dutch company agreed to be responsible for the day to day management of the company in question. In taking decisions to buy and sell the relevant shares the Dutch management company followed the recommendations of accountants in Manchester. This fact did not mean that the residence of the company in question was in the UK. Chadwick LJ said the following:-

“In seeking to determine where “central management and control” of a company incorporated outside the United Kingdom lies, it is essential to recognise the distinction between cases where management and control of the company is exercised through its own constitutional organs (the board of directors or the general meeting) and cases where the functions of those constitutional organs are “usurped” – in the sense that management and control is exercised independently of, or without regard to, those constitutional organs. And in cases which fall within the former class, it is essential to recognise the distinction (in concept at least) between the role of an “outsider” in proposing, advising and influencing the decisions which the constitutional organs

take in fulfilling their functions and the role of an outsider who dictates the decisions that are to be taken.”<sup>6</sup>  
On the facts of the case, Chadwick LJ went on to say that it was insufficient to establish residence in the UK:-

“...that the steps taken were part of a single tax scheme, that there were overall architects of the scheme in Price Waterhouse, and that those involved all shared the common expectation that the various stages of the scheme would in fact take place.”<sup>7</sup>

The upshot of what is said in *DB Group Services (UK) Ltd v. HMRC*, and *Wood v. Holden* is that the Revenue will find it difficult to find control in a person other than the person who ostensibly has control unless it can be established that the third party effectively “dictates” what should occur, whether in general meetings or at the level of the Board of Directors. Care must be taken to ensure, that a shareholder’s agreement, if one exists, does not take away “control” from those who ostensibly have it. Even in the absence of such agreement, control may be found in the hands of third parties if those who have ostensible control do the bidding of third parties without exercising independent thought. If shareholders exercising powers in general meeting are not bound to follow any particular course of action, and ultimately consult their own best interests in exercising their powers, then the Revenue will be unable to go behind those ostensibly exercising control to find control elsewhere. This is so even where what is done follows a pre-planned course of action. In establishing corporate residence abroad, so long as directors properly apply their minds to the wisdom and benefits of a particular course of action, control will be found with them.

The decisions of the Court of Appeal in question provide comfort in cases where SPV’s are used, in particular in foreign jurisdictions, whether by groups of companies in the course of managing their general affairs or in cases where such

companies are used for tax purposes. Attempts by the Revenue to go behind those who have ostensible control to find control elsewhere are unlikely to be successful so long as basic rules, as referred to in the preceding paragraph are followed. In this connection, record keeping is important to provide evidence of what and where things have been done. What is vital though is that the underlying reality accords with those having ostensible control in fact exercising that control, not simply and thoughtlessly doing the bidding of third parties.

*Endnotes*

- 1 Previously s.416 ICTA 1988.
- 2 See *Steele v. European Vinyls Corp Holdings BV* [1996] STC 785.
- 3 [2014] STC 2278
- 4 ITEPA 2003 s.429.
- 5 [2006] STC 443
- 6 See p.460
- 7 See p.462