



FORWARD GROUP
Private Client | Corporate | Funds

GUIDANCE NOTE

MAINTAINING NON-UK TAX RESIDENCE OF A NON-UK COMPANY

Introduction

This Guidance Note does not constitute tax advice and should not be relied on as such, it serves to highlight some of the relevant considerations and practical steps that should be considered in determining the location of management and control of a company, which in turn are a means of establishing the tax residence of a company.

The guide is not to answer all of the detailed questions that clients may have, and it is not intended to be advice, but merely indicative guidance. We can gladly introduce you to appropriate legal or tax advisors to provide the advice suitable for your particular circumstances and situation.

The guide was adapted from a guidance document originally prepared by LexisNexis. If considered appropriate it can be adapted into a resolution or an agreement that governs the decision-making process of the board, as an adjunct to the matters contained in the company's constitutional documents.

Whilst UK-centric, this Guidance Note covers management and control in a general sense that may apply equally to other jurisdictions.



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1 Company's tax residence

- 1.1 The board of directors of the company should manage the affairs of the company to ensure that the company remains resident for tax purposes in Jersey and nowhere else. Specifically, this guidance is intended to ensure that the company should not be or become resident for tax purposes in the UK.
- 1.2 Whether or not a company incorporated outside the UK, is centrally managed and controlled in the UK and therefore UK tax resident, is a question of fact. It is therefore important that the directors of the company follow the correct procedures that ensure so far as possible that the company does not inadvertently become tax resident in the UK.

2 Board of directors exercise strategic control

2.1 Powers of the board of directors

The directors should be authorised by the company's articles of association to manage the business of the company, including exercising all the powers of the company as are not required to be exercised by the company in general meeting. It is recommended that the board should only take their decisions collectively, and at board meetings, or in written resolutions following the procedures set out in the articles of association and also in these guidelines.

2.2 Matters reserved for the board of directors

It is recommended that the following matters are reserved for the board of directors:

- 2.2.1 approval of material contracts, such as material investments, acquisitions and disposals by the company or its group, including contracts which are not in the ordinary course of business;
- 2.2.2 approval of the company's financial policy and annual budget;
- 2.2.3 approval of the company's financing, including borrowing and issues of equity or debt securities;
- 2.2.4 approval of any significant change in the company's accounting policies or practices;
- 2.2.5 approval of all prospectuses, listing particulars, circulars, resolutions and other similar or related documentation sent to shareholders;
- 2.2.6 approval of changes in the capital structure of the company;
- 2.2.7 establishing committees of the board, approving their terms of reference, reviewing their activities and, where appropriate, ratifying their decisions;
- 2.2.8 approval of the company's annual report, accounts and quarterly financial statements;
- 2.2.9 approval of the dividend policy; and
- 2.2.10 declaration of the interim dividend and recommendation of the final dividend.

3 Composition of the board of directors and notification of tax residency

- 3.1 For the purposes of this Guidance Note:

- 3.1.1 **UK directors** means directors that are resident in the UK for tax purposes and **UK director** shall mean any one of them;
 - 3.1.2 **Jersey directors or local directors** means those directors that are resident in Jersey for tax purposes and **local director** shall mean any one of them; and
 - 3.1.3 **non-UK directors** shall mean those directors that are resident in jurisdictions other than the UK for tax purposes and **non-UK director** shall mean any one of them.
- 3.2 Since it is the board of directors that takes the important decisions in respect of the company's policy, management and strategy, its composition is important. The board wants to ensure that its composition is appropriate to the business of the company. Consequently:
- 3.2.1 the board must consist of persons who have the experience, knowledge and skills-sets appropriate to the business of the company so that the board can effectively control and supervise that business;
 - 3.2.2 a majority of the board of directors must be local directors and such local directors must, when compared to any non-local directors (whether executive or non-executive), have the necessary experience, knowledge and skills-sets to ensure their independence from such non-local directors;
 - 3.2.3 only a minority of directors should be tax resident in the UK;
 - 3.2.4 to the extent that there are two or more directors (or alternates) who are resident in the UK for tax purposes, they should not:
 - (a) confer on board level matters outside of the board meetings;
 - (b) confer on board level matters while in the UK; and/or
 - (c) work in the same business unit of the company or come into contact regularly otherwise than at board meetings held outside the UK.
- 3.3 If there is a UK director:
- 3.3.1 decisions of the board of directors should only be taken by way of meetings held outside the UK and not generally by way of written resolution;
 - 3.3.2 the experience and skills-set of the non-UK directors participating in and attending the meetings must be appropriate to enable the non-UK directors to make an independent and informed decision;
 - 3.3.3 the minutes of the meetings should capture the full extent of any discussion or debate on any particular issue;
 - 3.3.4 non-UK directors should physically attend board meetings rather than participate remotely, other than in exceptional circumstances; and
 - 3.3.5 the UK directors should physically attend meetings in which they are participating, other than in exceptional circumstances when they may participate remotely from outside the UK or, subject to adhering strictly to the procedure set out in clause 8.3 (Dealing with emergencies), a minority of directors may participate remotely from the UK.

- 3.4 The company's articles of association should provide that no more than a minority of the directors may be UK directors and that if a director becomes UK tax resident their directorship terminates if the result is that more than a minority of the directors would otherwise be UK directors. Similar provisions apply to alternate directors in the company's articles. An alternate director's appointment as an alternate terminates.
- 3.5 The board should aim to ensure compliance with the articles, and these guidelines in respect of the composition of the board, and therefore may require each director and each alternate director to notify the board of directors of:
- 3.5.1 where the person is resident for tax purposes immediately prior to appointment as a director or alternate, such notice to be provided prior to the appointment; and
 - 3.5.2 if there has been or, to the person's knowledge there is likely to be, any change in the place where the person is resident for tax purposes, such notice to be provided as soon as the person becomes aware of such change or potential change.

4 Location of board meetings

- 4.1 The board meetings should be held in Jersey, typically this would be in the offices of Forward Group and not in the UK.
- 4.2 The company's articles could strengthen this, for example to also provide that holding a board meeting in the UK invalidates any decision or resolution passed at such meeting. Any items discussed or decided at such a meeting would need to be tabled again at another meeting and no measures to implement such an invalid resolution must be undertaken. Implementing measures must only be undertaken once the decision or resolution has been validly passed.

5 Number of board meetings

Board meetings should be held as often as required and, in any event, should be held at least as often as may be reasonably necessary given the nature of the business and with due regard to the requirements of Jersey Economic Substance legislation (if applicable).

6 Preparation for board meetings and written resolutions

- 6.1 Notice of a board meeting must (so far as possible):
- 6.1.1 be accompanied by an agenda of the business to be discussed and any available relevant documentation; and
 - 6.1.2 be sent to each director in advance of the meeting and ideally 21 days prior to the meeting or as prescribed in the articles.

to enable the directors and, in particular, those based outside of Jersey, to arrange their schedules to attend the meeting physically and to enable them to consider the items on the agenda and any relevant documentation in advance of the meeting so that they are prepared to discuss them and take decisions in relation to them at the meeting.

- 6.2 A proposal for a written resolution must also be accompanied by any available relevant documentation and be sent to each director in advance of the time when it is proposed that the directors must pass or reject the proposal.

7 Attendance and voting at board meetings and alternate directors

- 7.1 Directors or, where relevant, their alternates should aim to attend board meetings in person.
- 7.2 When physical attendance at a board meeting is not possible or is too onerous, the directors, or where relevant their alternates, may in accordance with the company's articles participate in that board meeting remotely, noting that:
- 7.2.1 the majority of the directors participating in the meeting should attend the meeting in person in the same location outside the UK; or
 - 7.2.2 if it is not possible to comply with 7.2.1, the largest group of directors together in the same place are those attending the meeting in person in the same location outside the UK, ideally the location where the meeting was convened; and
 - 7.2.3 no director (whether a UK director or a non-UK director) physically present in the UK at the time of the meeting should participate in or vote at the meeting unless the circumstances are exceptional, in which case the procedure set out in clause 8.3 (Dealing with emergencies) should be strictly followed.
- 7.3 Of the directors and, where relevant, alternate directors participating in a meeting:
- 7.3.1 no more than a minority of them should be resident in the UK for tax purposes;
 - 7.3.2 the number of directors and alternates resident in Jersey that participate in a meeting should, where possible, exceed the number of participating directors and alternates resident for tax purposes in any other single jurisdiction or, where this is not possible, the largest number of directors and alternates resident in any single jurisdiction that participate in a meeting should, where possible, exceed the number of participating directors and alternates resident in the UK for tax purposes;
 - 7.3.3 pursuant to the company's articles, each director is entitled to one vote;
 - 7.3.4 pursuant to the company's articles, an alternate should only act for one director at a time so each alternate is entitled to one vote in respect of the alternate's appointor, as well as another vote if the alternate is also a director; and
 - 7.3.5 where the chair has a casting vote but, if in future, the chair is to be resident in the UK, such chair should only be appointed after the company's articles have been amended to prohibit the chair from having a casting vote.
- 7.4 When physical attendance at a board meeting is not possible or is too onerous, a director may, in exceptional circumstances, attend, participate and vote on decisions in the meeting remotely from the UK provided the guidelines in clause 8.3 (Dealing with emergencies) are strictly followed, or, in accordance with the company's articles send an alternate director to attend the meeting instead. The board should ensure that the use of alternates does not result in the rules for attendance at meetings being breached inadvertently and, to that end, with respect to alternates:

- 7.4.1 only directors resident in the UK for tax purposes are permitted to choose as an alternate director a person who is also resident in the UK for tax purposes;
- 7.4.2 the directors should, where possible, choose as an alternate a person that is resident for tax purposes in Jersey;
- 7.4.3 no alternate should, save for exceptional cases, act as an alternate for more than one director at the same time; and
- 7.4.4 they should be used sparingly and no more than two meetings each year may involve an alternate.

8 Dealing with emergencies

- 8.1 The directors recognise that they or those to whom they have delegated powers must be able to deal with unexpected matters which require urgent attention without compromising the procedures designed to reduce the risk that the company might be treated as becoming UK tax resident. If an urgent matter requires attention, the following procedure should be followed:
 - 8.1.1 if the matter falls clearly within the remit of the board of directors, a board meeting or, if that is not feasible, a written resolution of the board should deal with the matter; and
 - 8.1.2 if the matter falls clearly within the remit of a committee or other person to whom the board has delegated its powers, this committee or other person should deal with the matter.
- 8.2 If it is not clear whether the urgent matter is a board level matter, the directors could, if they are all able to be contacted, agree by e-mail whether they consider the matter to be something that is a board level matter which requires their attention. If the board agrees that it is not a board level matter, the board should consider if the matter is something which falls within the terms of reference of an existing body or individual to whom the directors have already delegated powers. The directors must take great care in coming to a decision about whether or not the matter is a board level matter since, if this assessment is incorrect, it could potentially mean that a body or person from the UK takes a board level decision and might therefore increase the risk that the Company might be treated as being UK tax resident.
- 8.3 In exceptional circumstances, directors of the company are permitted to attend a board meeting remotely from the UK (for instance, by video or audio conference or other electronic means) provided that:
 - 8.3.1 this is permitted by the company's constitutional documents or the relevant law applicable to the company;
 - 8.3.2 there is no other feasible alternative, i.e. the attendance of one or more of the UK directors (or non-UK directors that are physically located in the UK at the time of the meeting) is required and it is not feasible for them to attend the meeting in person or from another jurisdiction outside the UK or to appoint alternate directors (preferably, local directors) for the meeting and, where an alternate director is appointed who is tax resident outside the jurisdiction of the Company's intended residence, local advice should be obtained to ensure that this should not result in the Company being tax resident in that other jurisdiction;
 - 8.3.3 this only happens infrequently, preferably as a one-off occurrence;

- 8.3.4 the risk that the Company might be treated as being UK tax resident as a result of a minority of directors participating in a meeting remotely from the UK is judged to be low in the light of all relevant circumstances;
- 8.3.5 the meeting is conducted in accordance with the company's constitutional documents;
- 8.3.6 the meeting (even if all participants attend remotely) is still held outside the UK;
- 8.3.7 the UK directors attending the meeting and those attending the meeting remotely from the UK (even if they are non-UK tax resident but attending the meeting remotely from the UK), must constitute no more than a minority of those attending and able to vote at the meeting;
- 8.3.8 other than the minority of directors attending remotely from the UK, the chair person of the meeting, along with all other directors attending the meeting, are physically located outside the UK even if they are attending the meeting remotely;
- 8.3.9 the composition of those attending, participating and voting at the meeting should satisfy clause 7.3.2 (ie the number of directors and alternates resident in Jersey that participate in a meeting should, where possible, exceed the number of participating directors and alternates resident for tax purposes in any other single jurisdiction or, where this is not possible, the largest number of directors and alternates resident in any single jurisdiction that participate in a meeting should, where possible, exceed the number of participating directors and alternates resident in the UK for tax purposes);
- 8.3.10 the meeting is quorate and would have been quorate even if the attending directors participating remotely from the UK had been absent;
- 8.3.11 the telephone or video call (or other electronic service) used for the meeting is initiated and terminated from outside the UK;
- 8.3.12 the minutes of the meeting are taken and retained outside the UK;
- 8.3.13 the meeting is accurately recorded in the minutes; and
- 8.3.14 the minutes record the reason why the participating UK directors (and also any participating non-UK directors that find themselves in the UK at the time of the meeting) could not travel to attend the meeting physically (e.g. ill health or public health related restrictions, such as those imposed to combat coronavirus, including travel restrictions, quarantines and self-isolation).

9 Written resolutions

- 9.1 Although the company's articles may permit the board to take decisions by way of written resolution, this method should only be used infrequently and in emergencies. Because written resolutions do not involve a meeting of the board, there is no record of any discussion or debate on the matter prior to the resolution being passed or rejected, making it easier to argue that the decisions may well have been taken elsewhere, possibly in the UK, and merely rubber-stamped by way of written resolution.
- 9.2 If a proposal is put before the directors in the form of a written resolution, it could be important that the procedures outlined below are followed, to ensure that:

- 9.2.1 no more than a minority of those signing the written resolution are resident in the UK;
 - 9.2.2 a majority of those signing the written resolution sign it outside the UK;
 - 9.2.3 the last person to sign the written resolution signs it outside the UK; and
 - 9.2.4 each director writes, next to that director's signature of the resolution, the place where that director signed the resolution.
- 9.3 The company's articles could provide that any written resolution passed by the directors which does not satisfy the conditions in clause 9.2 is invalid. Any such resolution would then need to be proposed again, either at another meeting or by way of another written resolution, and no measures to implement such an invalid resolution must be undertaken. Implementing measures must only be undertaken once the resolution has been validly passed.

10 Delegation of directors' powers

- 10.1 The company's articles may permit the board to delegate any of its powers as it sees fit. To reduce the risk that the company might be found to be UK tax resident, it is important that it is the directors who collectively as a board exercise central management and control of the company in meetings held outside the UK or, occasionally, by way of written resolutions adopted in accordance with the strict procedures set out in the articles. In delegating their powers, the board must set out and adopt the terms of reference applicable to the committee, individual or other person to whom the directors have delegated their powers, with the aim that all matters of strategy, policy and top level management decisions are reserved for the board, so that it is only the non-board level points or the preparatory part of board level matters which are to be delegated, leaving the full board to take decisions on or to approve a proposal recommended by the delegated body or person in respect of them.
- 10.2 Whenever delegating their powers, the board must detail the terms of reference applicable to the committee, individual or other person to whom the directors have delegated their powers, including:
- 10.2.1 specifying what types of non-board level matters or decisions can be taken by the committee, individual or other person to whom the board has delegated its powers without referring back to the full board, with all other matters and decisions requiring further board approval;
 - 10.2.2 that the body, individual or other person is accountable to, and under the supervision of, the full board;
 - 10.2.3 what experience and tax residence the members of the committee or other person to whom any power is delegated should have (and, in particular, the company's articles provide(s) that such a person must not be UK tax resident and must exercise such delegated duties outside the UK);
 - 10.2.4 in the case of a body to whom the powers are delegated, the minimum number of times per year that the body must meet;
 - 10.2.5 the minimum number of times per year that the body, individual or other person must report back to the full board, with the understanding that the body, individual or other person may need to, or wish to, report back more frequently;

- 10.2.6 in terms of the matters or proposals which are referred to the board, the body, individual or other person must only ever recommend actions to the board, leaving the board to take the decision that is in the best interest of the Company, even if that means rejecting the proposal;
- 10.2.7 that such body, individual or other person must not sub-delegate any of those duties without specifically being authorised by the board to do so; and if they are authorised to sub-delegate, to ensure that it is clear to whom they are able to sub-delegate; and
- 10.2.8 if a body, individual or other person is authorised by the board to sub-delegate any of its duties, detailing which of the duties may be sub-delegated and to whom (including what tax residency such person must have or must not have) and under what terms such matters may be sub-delegated.

As an example, if the board had in principle approved the sale of a material asset owned by the company, the board could delegate to a committee or a single director or another individual, like an employee of the company, to negotiate the heads of terms with the potential buyer, but with the caveat that the heads of terms would be subject to the approval of the full board. Once the committee or individual had negotiated a heads of terms document, it would be up to the board to approve or reject the heads of terms. If the board approved the heads of terms, the board could again delegate to the same or other committee or individual to negotiate and finalise the agreement for that sale provided that it accurately reflected the heads of terms; the board may even give the committee or individual a bit of room to negotiate by specifying that no further board approval would be required if the price was no less than a specified floor and the other terms of the agreement were market standard. If the sale price was less than a specified floor or the warranties or other terms of sale were, according to the Company's external legal or other advisers, more onerous than is normal in such a sale, or the agreement did not accurately reflect the heads of terms, the committee, director or other individual would need to revert back to the full board for approval.

11 Records of decisions and materials considered

- 11.1 The company should keep, and have readily available, accurate and contemporaneous records (whether in written, audio or video form) of:
 - 11.1.1 what occurs in board meetings;
 - 11.1.2 written resolutions;
 - 11.1.3 materials presented, or made available, to the board, including but not limited to, those made available to the directors prior to or in meetings or in relation to written resolutions;
 - 11.1.4 what occurs in general meetings;
 - 11.1.5 any materials made available to the shareholders; and
 - 11.1.6 evidence such as, for instance, boarding card stubs, train tickets or other document (including stamps in a director's passport) to prove that any UK based directors participating in a meeting actually travelled to attend the meeting.
- 11.2 With respect to records or minutes of meetings, it is better for evidential reasons if the records or minutes are written, signed and dated contemporaneously with the relevant meeting or shortly

thereafter, rather than months or years later. Accurate contemporaneous minutes of board meetings should include:

- 11.2.1 what was the business of the meeting;
- 11.2.2 where outside the UK the meeting took place;
- 11.2.3 the date and time of the meeting
- 11.2.4 who attended the meeting; and
- 11.2.5 if any UK directors attended the meeting remotely from the UK, the reason why they were unable to travel to attend the meeting in person. (See also clause 8.3.14.)

This does not mean that draft minutes cannot be prepared in advance. They can, but they should serve merely as a guide to what the meeting should cover and not as a template from which the directors cannot stray. Someone attending the meeting should take notes and amend the pre-prepared minutes of the meeting to reflect any matter not detailed in the minutes but which is in any event discussed or to expand the minutes where any matter already included in the pre-prepared minutes leads to a discussion or debate prior to a proposal being passed or rejected. It is particularly important for the board to actively consider what is important and beneficial to the company and for the minutes to reflect this.

- 11.3 Regardless of what the records say, if facts emerge which cause the tribunal or court to doubt the veracity of the documents, the weight accorded to them in determining what in fact happened in the past decreases.

As has been demonstrated by the FTT's decision in *Development Securities* (a decision that was reinstated on appeal by the Court of Appeal), it is best practice for the board to actively consider the substantive decisions to be made in respect of the company and for the minutes to reflect this. This is particularly important in certain circumstances, such as where the transaction to be undertaken by the non-UK incorporated company is inherently uncommercial from the non-UK company's perspective and is part of a plan designed for the UK parent and its UK corporate group to avoid tax. For more information, see News Analyses: [HMRC succeeds on corporate residence—Court of Appeal reverses Upper Tribunal's decision \(Revenue and Customs Commissioners v Development Securities\)](#) and [Court of Appeal reinstates FTT's decision that Jersey-incorporated subsidiaries were UK tax resident \(HMRC v Development Securities\)](#).

12 Location of books, records and register of members

- 12.1 Any books, records (including minutes) or register of shareholders should be kept and maintained outside the UK. Although their location should not determine whether the company is tax resident in the UK or not, especially since the activities related to them are more administrative in nature, locating them outside the UK may provide marginal support for the company not being UK tax resident. It is also helpful if any request for records have to be made to the company secretary or equivalent in Jersey.
- 12.2 If a non-UK incorporated company's register of members is kept and maintained outside the UK, a transfer of the non-UK-incorporated company's shares should not attract UK stamp duty or stamp duty reserve tax provided that the shares are not paired with UK shares and the instrument of transfer is executed and retained outside the UK. The company's register of members (including a copy of such register) must therefore be kept and maintained in Jersey.



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