THE IMPACT OF THE COMMUNICATIONS REVOLUTION ON THE APPLICATION OF "PLACE OF EFFECTIVE MANAGEMENT" AS A TIE BREAKER RULE

A DISCUSSION PAPER FROM THE TECHNICAL ADVISORY GROUP ON MONITORING THE APPLICATION OF EXISTING TREATY NORMS FOR THE TAXATION OF BUSINESS PROFITS

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Introduction

1. The purpose of this paper is to identify possible limitations we are likely to face with the application of the "place of effective management" tie breaker rule in the current and future environment of electronic commerce and technology and to identify possible solutions.

2. This paper is broadly divided into four parts. The first part of the paper provides a brief background to taxing principles, double taxation and the role of the residence tie-breaker. The second part looks at the guidance that is available on how the "place of effective management" may be determined in a traditional environment. It attempts to draw together, from a number of different sources, the list of key factors for determining a "place of effective management". The third part of the paper considers how these key factors may apply in a modern, technologically advanced environment. Finally, the paper will identify possible options to overcome the tie-breakers limitations. In doing so, some specific issues are identified for further consideration, and comments are sought on these options and issues.

Taxing principles and double taxation

3. There are two main principles under which countries tax income - source and residency.

4. Income derived by a person may be taxed by a country because of a connection between the country and the generation of the income (source jurisdiction). For example, a business is carried on in the country, real property is located in the country, or an employee works in that country. Countries assert source jurisdiction to tax income on the basis that the income is generated from economic activity within the country.

5. Countries may also tax income (wherever derived) because the person earning the income is a resident of that country (residence jurisdiction). A country's justification for residence tax may be seen to rest on the need to finance its public goods and social infrastructure, and the nexus between the consumption of such public goods and social infrastructure by persons who are residents having an over-all capacity to pay.

6. Most countries tax income on both a *source* and *residence* basis. That is, a resident person is usually taxed on income from both domestic and foreign sources, whilst non-residents are only taxed on domestic source income.

7. Most instances of double taxation will arise as a result of residence-source jurisdictional conflicts. However, double taxation can also arise from *residence-residence conflicts* where both Contracting States treat a person as a "resident" for tax purposes under their domestic law (with the result that the person is fully liable to tax in both States).

8. The main focus of Double Tax Conventions is to avoid such double taxation which, if not addressed, may impede cross border flows of trade, investment and capital.

Resolving residence-residence conflicts

9. The OECD Model Tax Convention deals with residence -residence conflicts through tie-breaker rules in Article 4 which allocate residence of the "dual resident" person to one of those

States, so that person is treated as a resident solely of that State for the purposes of the Convention. In the case of an individual, the tie-breaker rules look at various indicia of personal attachment to a State with a view to determining to which State "it is felt to be natural that the right to tax devolves."[1]

10. In the case of companies and other bodies of persons, a tie-breaker rule based on personal attachment is clearly not appropriate. The Commentary also rejects a tie-breaker based on purely formal criteria such as registration. In giving preference to the State where the entity is "actually managed"[2], it would seem that the intention is to select a criterion which reflects where the main management decisions are taken.

11. Paragraph 3 of Article 4 of the OECD Model Tax Convention states that a non-individual:

> *"..shall be deemed to be a resident only of the State in which its **place of effective management** is situated." [Highlight added]*

How do you determine a "place of effective management" in a traditional environment?

12. The meaning of the term "place of effective management" is not defined in Article 4 of the OECD Model Tax Convention. However, the following new paragraph 24 in the Commentary on Article 4 which was included in the 2000 Update to the Model, offers some guidance on the meaning of this term.

> *"24. …The place of effective management is the place where key management and commercial decisions that are necessary for the conduct of the enterprise's 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 definitive rule 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 it can have only one place of effective management at any one time."*

13. The new paragraph reinforces the point that the determination of a place of effective management is a question of fact.

14. The term "place of effective management" is also used in Article 8 (Shipping, Inland Waterways Transport and Air Transport) of the OECD Model Tax Convention as the key criterion for determining the allocation of taxing rights over income derived from the operation of ships or aircraft in international traffic. The term is also used under Article 13(3), 15(3) and 22(3) for allocating taxing rights to capital gains or dependent personal services income from shipping, inland waterways and air transport.

15. However, the term "place of effective management" is not defined in any of the Articles mentioned above. Nor is any further guidance given on its meaning.

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1. Paragraph 10 of the Commentary on Article 4 of the Model Tax Convention.

2. Paragraph 22 of the Commentary on Article 4 of the Model Tax Convention.

16. In the absence of any specific definition of "place of effective management", many commentators have been influenced by concepts used in domestic tax law residence rules, such as "central management and control"[3] and "place of management"[4], when considering the meaning of the term "place of effective management".

Guidance from "Central Management & Control" (CM&C)

17. CM&C is one of the residence tests adopted in a number of different countries[5] for non-individuals. For example, under Section 6(1) of Australia's Income Tax Assessment Act 1936, a company is a resident of Australia if:

- It is incorporated in Australia; or
- It carries on business in Australia and is centrally managed and controlled in Australia; or
- It carries on business in Australia and its voting power is controlled by shareholders resident in Australia.

18. Understanding the factors which determine a place of CM&C may provide assistance in determining a place of effective management.

19. In Australia, the expression "centrally managed and controlled" is not defined in the domestic tax legislation. However, there are a number of court cases which provide some guidance on how the place of CM&C is to be determined.

20. According to a number of court decisions, while determining a place of CM&C is a question of fact, it ordinarily coincides with the place where the directors of the company exercise their power and authority (which will generally be where they meet).[6] A leading case establishing this is *De Beers Consolidated Gold Mines (1906) AC 455.* In that case a company registered in South Africa worked diamond mines, had its Head Office and held its general meetings of shareholders all in South Africa. Its Directors held meetings both in South Africa and in the United Kingdom, but the Directors' meetings held in the United Kingdom were found to be those where real control of the company was exercised. Accordingly the company was found to be UK resident.

21. In a number of Canadian cases,[7] the courts, relying on the statement of the Lord Chancellor in the *De Beers* case, have found that the place of CM&C was where the company "really keeps house and does business". Some of the factors taken into account in determining this place include:

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3. See Hamilton, R and Deutsch R, *Guidebook to Australian Taxation*, Legal Books Looseleaf Service, Paragraph [6.140].

4. See Vogel, K, Klaus Vogel, *Double Taxation Conventions*, 3rd edition, Kluwer Law International, page 262.

5. For example, Australia, Ireland and the United Kingdom.

6. See Waterloo Pastoral Co Ltd v FCT (1946) 72 CLR 262, Capitol Life Insurance Co v R (1984) CTC 141 and Gurd's Products Co v R (1985) CTC 85.

7. Birmount Holdings Ltd v R (1978) CTC 358, Tara Exploration & Development Co Ltd v MNR (1970) CTC 557 and Capitol Life Insurance Co v R (1984) CTC 141.

- Place of incorporation.
- Place of residence of shareholders and directors.
- Where the business operations take place.
- Where financial dealings of the company occurred; and
- Where the seal and minute books of the company were kept.

22. However, this general rule is by no means conclusive. The courts have also taken certain other factors into account when determining the place of CM&C. In *North Australian Pastoral Co Ltd v FCT (1946) 71 CLR 623*, the taxpayer company was regarded as a resident of the Northern Territory where the actual business operations were located, notwithstanding that the directors meetings were held in another State. This conclusion was reached based on the fact that:

- The company's whole undertakings, being, incorporation, registered office, public office and full books of account were located in Northern Territory.
- The directors met in Brisbane, Queensland, as a matter of convenience.
- The manager of the property in the Territory took the responsibility for the success or failure of the venture; and
- Visits to the property by the directors and consultation with the manager were acknowledged to be of importance in reaching policy decisions.

23. However, in *Malayan Shipping Co Ltd v FC of T (1946) 71 CLR 156*, the court held that the company was a resident of Australia because the managing director exercised from Australia complete management and control over the business operations of the company, notwithstanding that the trading operations were conducted abroad.

24. In certain exceptional circumstances, the place where a controlling shareholder (such as a parent company) makes its decisions may be relevant in determining where the central management and control is located. In *Unit Construction Co Ltd v Bullock (Inspector of Taxes) (1959) 3 ALL ER 831*, three wholly owned subsidiary companies were incorporated in Kenya. By their articles of association, powers of management were vested in the directors who were located in Kenya and who could not validly hold meetings in the United Kingdom. However, these management powers were not in fact exercised by the local directors who stood aside in all matters of real importance, so that it was the board of directors of the parent company in the United Kingdom which effectively made all the decisions. This resulted in the subsidiaries being held to be UK residents.

Guidance from "place of management"

25. Place of management is another residence test adopted by a number of treaty countries[8] to determine residence of non-individuals. Some countries, *e.g.* Switzerland, use the concept of "place of effective management" in their domestic law.

8. For example, Germany and the Netherlands.

26. In Swiss practice, a distinction is drawn between the place of effective management and merely administrative management or decision making by executive bodies (*e.g.* Where the decisions of a board of directors are limited to control of the company and to basic decisions). Although there are no court decisions on the meaning of the term "place of effective management", it would be expected that the same interpretation would apply to the term as used in Swiss treaties and its domestic law.

27. In describing the meaning of "place of effective management", Professor Vogel[9] suggests that it is similar to that of "place of management" used under the German domestic law.

28. According to the German case law, a place of management is regarded as the place where the management's important policies are actually made. Vogel states that "what is decisive is not the place where the management directives take effect, but rather the place where they are given."[10] It is the centre of top level management, i.e. the place at which the person authorised to represent the company carries on his business managing activities. If a controlling shareholder does in fact manage the conduct of the company's business, then that shareholder may be regarded as being in charge of the top level management, and the place where those decisions are made would appear to be the centre of management. However, Vogel indicates that a place from which a business is merely supervised would not qualify.

29. Vogel also states that, under German law, if the place of management cannot be determined by the application of these criteria, the top manager's place of residence may determine the residence of the company.

30. The analysis in this section is based on the experience of a limited number of countries. Comments are particularly invited on the experience in other countries which use the central management and control or place of management concept, or other similar concepts which may provide guidance on the meaning of place of effective management.

Summary of key factors in determining a place of effective management

31. A place of effective management will generally be where key management and commercial decisions necessary for the conduct of a business are in substance made and given. This will ordinarily be where the directors meet to make decisions relating to the management of the company, but the determination of a place of effective management is a question of fact and other relevant factors taken into account by the courts have included:

- Where the centre of top level management is located.
- Where the business operations are actually conducted.
- Legal factors such as the place of incorporation, the location of the registered office, public officer, etc.

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9. See Vogel, K, Klaus Vogel, *Double Taxation Conventions*, 3rd edition, Kluwer Law International, page 262 in which he states "The German domestic term 'place of management' is very similar to the treaty term 'place of effective management', and even more so because the former term is interpreted by the courts to refer to the factual conditions."

10. Supra at page 262.

- Where controlling shareholders make key management and commercial decisions in relation to the company; and

- Where the directors reside.

32. It should be noted, while the guidance from *Central Management & Control* and the *Place of Management* indicates the place of effective management will ordinarily lie with the directors, in certain circumstances these strategic decisions and powers may be exercised by others. For example, the guidance provided in paragraph 24 of the Commentary on Article 4, makes it clear that the relevant consideration is where the high level decision making occurs. If this function is performed by persons other than the Board of Directors, then the relevant consideration is the place where those other people make their decisions.

33. In the past, in an environment where the most senior manager or managers tended to operate from and meet in a single location such as a head office, determination of the place where key management and commercial decisions were made was not too difficult. The place where the top level management activities occurred would mainly coincide with the place where the company was incorporated and had its registered office, where the business activities were conducted and where the directors or senior managers resided. It was therefore, as the Commentary states "rare in practice for a company, etc. to be subject to tax as a resident in more than one State."[11]

34. However, the communications and technological revolution is fundamentally changing the way people run their business. Due to sophisticated telecommunication technology and fast, efficient and relatively cheap transportation, it is no longer necessary for a person or a group of persons to be physically located or meet in any one particular place to run a business. This increased mobility and functional decentralisation may have a significant impact on the incidence of dual resident companies, and the application of the place of effective management tie-breaker rules.

Limitations in a modern, technologically advanced environment

35. In a modern environment, the application of the above factors may not result in a clear determination of which State should be given preference as the State of residence, or may result in an outcome which does not appear to accord with the policy intentions of the provision.

Place of effective management in multi-jurisdictions

36. Given that the "place of effective management" is one of substance over form, in theory, it should always produce results which reflect the true policy intention of the tie breaker rule.

37. However, the availability of advanced and evolving communications technology such as videoconferencing or electronic discussion group applications via the Internet means that it is no longer necessary for a group of persons to be physically located or meet in one place to hold discussions and make decisions. In a modern environment, application of the traditional approach can produce results which do not reflect the intention of the tie-breaker rule. This is illustrated below.

38. If senior managers adopt conferencing through the Internet, for example, as a key medium for making management and commercial decisions and those managers are located throughout the

11. Paragraph 21 of the Commentary on Article 4 of the Model Tax Convention.

world, it may be difficult to determine a place of effective management. In such cases, a place of management might be regarded as existing in each jurisdiction where a manager is located at the time of making decisions, but it may be difficult (if not impossible) to point to any particular location as being the one place of effective management.

39. German case law suggests that the residence of a company may be determined by the residence of the top manager, in cases where the place of management cannot be determined. It may be that this approach could be extended to companies managed by a board of directors or senior executives. However, increasingly, it is likely that situations will arise where those people are not all residents of one country.

40. How does one determine, for example, a place of effective management when half of the directors reside in Country A, while the other half reside in Country B? This scenario may become more prevalent in the future as more companies list on multiple stock exchanges and if the recent announcement of a proposed globally tradable stock eventuates.[12]

41. Although the use of technology may increase the number of cases where a place of effective management may exist simultaneously in multiple jurisdictions, this possibility has also been recognised in traditional business operations. See for example, Lord Radcliffe's statement in *Bullock v The Unit Construction Co Ltd* 38 TC at page 739, *…individual cases have not always so arranged themselves as to make it possible to identify any one country as the seat of central management and control at all. Though such instances must be rare, the management and control may be divided or even, at any rate in theory, peripatetic.*

Mobility

42. Increasing numbers of enterprises conducting transnational businesses, combined with rapid improvement in global transportation systems, are also likely to have an impact on the place of effective management concept. In particular, there may be an increased incidence of mobile places of effective management.

43. It is not too difficult, for example, to envisage a situation where the managing director of a company who is responsible for the management of that company is constantly on the move. In some extreme cases, that person may consistently be making the decisions while flying over the ocean or while visiting various sites in different jurisdictions where his business is conducted.

44. Similarly, a board of directors may arrange to meet in different places throughout the year. For example, the board of a multinational enterprise may agree to meet at the offices of the enterprise around the globe on a rotational basis. This can also lead to an enterprise having a mobile place of effective management.

Anomalies

45. In the traditional environment a situation can arise where the company is treated as a resident for tax purposes under the domestic law of both Contracting States, but the place of effective management is in a third State). This may occur for example where increased use of modern technology may cause this to become a practical issue.

12. See <http:\\www.computershare.com>.

Options to resolve the limitations

46. It is generally accepted that there is a need to deal with residence-residence conflicts and most tax treaties achieve this through a residence tie-breaker to avoid the impost of double taxation. As a way of evaluating the options discussed we should do so on the understanding that to be an effective tie-breaker provision for treaty purposes the rule must operate to assign residence to only one of the Contracting States.

Place of effective management in multi-jurisdictions

47. As noted above, the characteristics of effective management may exist in a number of jurisdictions and it may be said to exist simultaneously in more than one jurisdiction without a specific single jurisdiction being dominant. Thus to the extent that the place of effective management test fails to provide a clear allocation of residence to one country, albeit in a limited number of cases, it may be seen to be an ineffective rule.

48. In order to achieve a tie-breaker rule that will produce a single territory result in all cases, the following options may be considered:

A) Replace the place of effective management concept.

B) Refine the place of effective management test.

C) Establish a hierarchy of tests, as in the individual tie-breaker so that if one test does not provide an outcome, the next test will apply; or

D) A combination of B and C above.

49. Another alternative is to deny dual resident companies the benefits under the Convention. Although this option does not address the issue of residence-residence conflicts resulting in double taxation, it does act as a deterrent to treaty abuse by dual resident companies.

A) Replace the place of effective management concept

50. Various options have been raised as a possible alternative tie-breaker, such as:

i) Place of incorporation or, in the case of an unincorporated association, place where corporate law applies to the establishment of the enterprise.

ii) Place where the directors/shareholders reside; and

iii) The place where economic nexus is strongest.

i) Place of incorporation or, in the case of an unincorporated association, place where corporate law applies to the enterprise

51. While the place of incorporation test has the advantage of being easily understood, has minimal administration and compliance costs in many cases, there are nevertheless arguments against its adoption as a tie-breaker test.

52. In today's environment the act of incorporating an enterprise or establishing an incorporated association is relatively simple. In fact, many jurisdictions allow online incorporation or establishment. As a result it is possible that the only tie an enterprise may have to the jurisdiction in which it is incorporated or established is a formal tie. For example, Company Z incorporated in Country A, may have its entire management, business operations and assets located in Country B. For this reason the place of incorporation was rejected as a tie-breaker test in paragraph 22 of the Commentary on Article 4.

> *"22. It would not be an adequate solution to attach importance to a purely formal criterion like registration…"*

53. Another issue. Suppose Company Z incorporated in Country A, divides its entire management, business operations and assets between Country B and C. If a treaty exists between Countries B and C, who both claim the company as a resident, a tie-breaker based purely on incorporation will not deliver a result between Country B and Country C. Therefore the underlying policy intent will not be realised and double taxation may result.

54. Similarly, the place of incorporation test may not be reflective of changes to an enterprise's circumstances over time. For example, Company Z incorporated in Country A and having its seat of management, operations and assets in that country may over time migrate these to another country. In such cases, the economic and business links to Country A may be reduced to a minimum, but under a tie-breaker rule based on place of incorporation, residence taxing rights would be allocated solely to that country. This would not seem to be a correct policy outcome.

55. Furthermore, as the process of incorporation is a formal one, it is possible at some later time to change the place of incorporation to another country using a number of methods. While this may not be widespread, especially where there may be capital gains tax implications, it is relatively easy to change residence by creating a new entity and transferring the business to it or by re-registering in another country.

56. Finally, in some jurisdictions it may be possible for a company to be incorporated in more than one country, which would have the effect of rendering such a tie-breaker ineffective.

57. Using the place of incorporation or establishment as a tie-breaker for companies would produce a result similar to looking to where an individual was born as opposed to where they live. Transposing this scenario of changing the place of incorporation to that of an individual would be to recognise place of birth as the sole residency test.

ii) Place where the directors/shareholders reside

58. As noted above, a test relying solely on where the directors/senior managers or shareholders reside will not always give a clear result. Even a test relying on where the majority of shareholders or directors/senior managers reside may not always result in certainty and may give rise to extreme results where the shareholders are not natural persons.

iii) Where the economic nexus is strongest

59. The economic connection to a State may be characterised by the extent that land, labour, capital and enterprise (the factors of production) are used by the company in deriving its profits. Using

those characteristics the tie-breaker would serve to determine to which State, the company has its strongest ties and to deem the company to be a resident solely of that State.

60. While on the surface it may appear that such an option is more aligned to source taxation rationale, it also may have some links to the underlying rationale for residence taxation. It could be argued that if the State provides certain facilities and infrastructure for its residents, those who benefit most from such facilities and infrastructure ought to contribute to the State via residence-based taxes. So if a company uses the legal infrastructure, consumes or uses the facilities etc in that State, there is a case that it ought to be treated as a resident. If it does so in more than one State, then a tie-breaker rule based on economic nexus would require a determination (as with individuals) of where its ties/consumption are stronger. However, it could also be argued that the use by a company of the facilities and infrastructure of a State is a rationale that supports source, rather than residence, taxation. Nevertheless, the concept of economic nexus could still be used as a tie-breaker even if it is not used as a basis for residence taxation. It should be noted that such a concept being used in a residence tie-breaker is not unprecedented. For example, the individual tie-breaker uses *"centre of vital interests"* as a determining factor in deeming residence.

61. It may be that this option warrants further consideration on the appropriateness of such a test to confer residence. If so, the consideration should be given as to what characterises economic connection to a State. Consideration should also be given to whether such a test may be overly difficult to apply as it could involve subjective comparisons. It also may discriminate against multinational enterprises resident in small countries.

B) Refine the place of effective management test

62. In refining the existing place of effective management test, two options have been suggested. Either, making a determination on the basis of predominant factor(s) or giving a weighting to various factors.

63. The construction of paragraph 24 of the 2000 Commentary presupposes that the determination is on the basis of the following predominant factors; where the key management and commercial decisions are made in substance; where the most senior person or group of persons makes its decisions and where the actions to be taken by the enterprise as a whole are determined. It may be that, for the majority of cases involving the company residence tie-breaker, these three factors readily deliver a decision which reflects the underlying policy intent. This may be considered the norm.

64. However, where analysis of these predominant factors does not produce a single place of effective management, it may be necessary to consider other additional factors, as is suggested in paragraph 24 of the Commentary where it states that *"however, no definitive rule can be given and all the relevant facts and circumstances must be examined to determine the place of effective management"*. Other facts which may be considered in association with the dominant factors could include:

- Location of and functions performed at the headquarters.
- Information on where central management and control of the company is to be located contained within company formation documents (articles of association etc).
- Place of incorporation or registration.

- Relative importance of the functions performed within the two States; and

- Where the majority of directors reside.

65. Comments are invited as to whether this would be a useful addition to the Commentary, and if so, what weighting should be given to the various factors and whether there are other factors which should be taken into account.

Addressing mobility

66. Article 4 does not offer guidance on this type of situation. However, Article 8 of the OECD Model Convention deals with one example of a mobile place of effective management. Paragraph 3 of Article 8 states:

> *"3. If the place of effective management ... is aboard a ship or boat, then it shall be deemed to be situated in the Contracting State in which the home harbour of the ship or boat is situated, or, if there is no such home harbour, in the Contracting State of which the operator of the ship or boat is a resident."*

67. In effect, the provision recognises that a place of effective management which is located on board a ship will be mobile, and to overcome this problem, operates to deem the place of effective management to be in the jurisdiction with which the shipping enterprise has its closest links.

68. It may be possible to devise a similar provision to deal with other situations where the place of effective management is mobile, *e.g.* where a single board of directors meets in different locations. It will not however address situations where a place of effective management could be said to exist simultaneously in multiple jurisdictions, for example, where directors from different countries conduct meetings by way of video-conferencing.

C) Establish a hierarchy of tests, as in the individual

69. Article 4 paragraph 2 of the Model Convention establishes a hierarchical approach for the individual residency tie-breaker. A similar approach may provide assistance in applying the corporate tie-breaker.

70. However, further consideration of a hierarchy of tests approach may be warranted. If we assume that an analysis of the predominant factors, (*i.e.* where the key management and commercial decisions are made in substance; where the most senior person or group of persons makes its decisions and where the actions to be taken by the enterprise as a whole are determined) will in general produce a correct result, then this may form the first level of the hierarchy as it would, in general, yield a result reflecting the policy intent in most cases.

71. The level or levels below would therefore deal with determinations regarded as the exceptions. A possible structure for such a hierarchy may be:

- Place of effective management.

- Place of incorporation.

– Economic nexus; and

– Mutual agreement.

72. Comments are invited on this approach, including whether such a test would limit our ability to deal with the tie-breaker situations considered to be the "exceptions" as a hierarchical approach will make the test rigid.

D) A combination of options B and C

73. A number of different options have been identified above and while some of these may prove to be an ineffective option in isolation they may be effective when combined with others. Therefore further consideration should be given to identify possible combinations resulting in an effective tie-breaker test.

Deny dual resident companies the benefits under the Convention

74. A number of countries have lodged reservations to Article 4 to deny dual resident companies the benefits under the Convention in certain circumstances.[13] While the individual countries' reasons for such reservations may differ, such an option may be seen to encourage the controller or controllers of a dual resident company to take appropriate measures to prevent dual residence.

75. However, as noted earlier, company dual or indeed multiple residency may occur due to conflicting residency rules. For example, incorporation/central management and control conflict. Under such an option, the corporate may be subjected to double taxation on its income even though there may be sound commercial reasons for their central management and control structuring.

Where to from here

76. In the majority of cases, the place of effective management tie-breaker test will provide the right result. However, the tie-breaker must be capable of effective application in ***all*** cases where dual residency arises.

77. Of the options put forward to date for the replacement of the current test, only the place of incorporation provides certainty (except in those rare cases where dual incorporation may arise). However, that test does not always give the right policy outcome as there may be little or no business/economic link and may be manipulated easily.

78. Further specification of factors giving rise to the place of effective management may assist. In response the paper identifies the following options for further consideration:

– "Where the economic nexus is strongest":

  Expansion of the 2000 Commentary to identify a further range of factors that may be relevant in determining the place of effective management.

13. See the reservations lodged by Canada, Mexico and the United States for details.

- In dealing with mobility of POEM explore a similar approach as in paragraph 3 of Article 8 which states; "If the place of effective management ... is aboard a ship or boat, then it shall be deemed to be situated in the Contracting State in which the home harbour of the ship or boat is situated, or, if there is no such home harbour, in the Contracting State of which the operator of the ship or boat is a resident."

- Establishing a hierarchy of tests; and

- Using a combination of options, such as those presented to develop an effective test.

79. Comments are invited on those options, and whether other alternatives not addressed in this paper should be considered. **Comments can be posted on the public EDG (**http://appli1.oecd.org/daf/taxandel.nsf and/or to register to participate in the EDG: http://www.oecd.org/daf/fa/e_com/e_rego.htm**) or e-mailed to** Jeffrey Owens, Head of Fiscal Affairs (daffa.contact@oecd.org) and copied to Jacques Sasseville, Head of Tax Treaty Unit (jacques.sasseville@oecd.org). The closing date for comments is **30 June 2001**.