

Preface

Like so many subjects, corporate residence has no obvious point of entry. It could be a cornerstone in the study of the income taxation of corporations. Alternatively, it might be regarded as a topic properly falling within a broader consideration of the charging provisions applicable to all taxpayers, a subset of the distinction between residence and source taxation.

Corporate residence may be viewed as a subject of domestic taxation, along with other fundamental definitions of the national legislation, or it could be subsumed under the rubric of treaty interpretation. Assuming that a jurisdiction imposes tax on the income of corporations, and that the tax base depends upon some defined attachment with the jurisdiction described as (or as a substitution for) "residence", then a study of the residency of companies is within the purview of domestic tax law. At the same time, comprehensive income tax conventions seek to assign taxpayers, including incorporated companies, to one of the contracting states on the basis of a nexus described as "residence", so that corporate residence is also a bilateral tax treaty issue.

All of these perspectives are reflected in this essay, but none is privileged. Rather, corporate residence is posited as a subject unto itself. The connection of incorporated entities with taxing jurisdictions that justifies residence-based taxation is considered to be a valid, meaningful and important issue that merits independent investigation and analysis. This does not, of course, extract it from the more specific fiscal contexts of corporate taxation, residence taxation, domestic law and tax treaties. On the contrary, each of these perspectives is legitimate and collectively they are the basis of the organisation of this essay.

This is not a book about Canadian taxation although that will be the most common single vantage point where purely domestic tax rules are under consideration. The analysis cannot be limited to Canada for several reasons.

- The Canadian meaning of corporate residence was not independently arrived at. Until legislators intervened in the 1960s, it was entirely a derivative concept, based upon developments in the jurisprudence of the United Kingdom.
- Corporate residence as applied in the setting of Canadian international taxation necessarily includes a consideration of residence as determined under income tax conventions. Canadian conventions have their quirks, but they are firmly rooted in the theory and practice of the OECD Model Convention and its Commentaries. There is more commonality than originality amongst the tax treaties.
- Many of the issues that arise from a close consideration of corporate residence in the particular Canadian income tax context are of more general interest. These include difficulties in the application of the case law test for corporate residence, problems of

drafting and construction in purely domestic legislative provisions and, of course, the interpretation and application of tax treaties.

- The underlying policy themes relating to corporate residence may be elucidated with reference to Canadian tax law, but they are certainly not peculiar to it.

It is easier to describe what this essay is not than what it is. It is not a tax policy text. The objective is not so lofty as to determine whether residence taxation of business corporations is a good or a sensible thing, or even what meaning should be ascribed to corporate residence to make it as good and sensible as possible. And though the text will repeatedly refer to and explore the historical development of corporate residence, it is not a work of fiscal history. Nor is this a source book or a practitioner's guide. It does not purport to review every case, treaty or statute dealing with corporate residence and footnotes will be restrained, included when the text would be incomplete without the corresponding reference. There are no "tips" or checklists.

The aim of the following chapters is, rather, to discover what is meant by corporate residence, how and why the concept developed in the case law of the United Kingdom, and how it is used today in income tax conventions and in Canadian domestic income tax law. The methodology is mainly descriptive or observational but, at the same time, the text will challenge both common habits and accepted wisdom. As a consequence, some issues will be given more shelf space than others.

It would be disingenuous to deny that this essay is also judgmental. The reader will, undoubtedly, remark some less than fully veiled criticism of certain developments in the history of corporate residence in Anglo-Canadian case law. The discussion of bilateral income tax conventions is not entirely appreciative of the OECD Model Convention and its judicial construction. The Canadian domestic legislation is adjudged to be often ad hoc and occasionally illogical.

William E. Simon, a former United States Treasury Secretary once said: "The nation ought to have a tax system which looks like someone designed it on purpose." It remains to be seen whether corporate residence meets this standard.