

# IBSA

International Business  
Structuring Association

VISTRA



**Brexit: Relocating your UK Company**

# What is the International Business Structuring Association?

The **International Business Structuring Association** is a unique global Association of Professional Advisers involved in the international business development of their entrepreneurial clients.

The IBSA has five regional branches in North America, UK, Continental Europe, the Middle East and Asia, each with their own committees, providing discussion group meetings on a variety of topics fundamental to such entrepreneurial clients.

The IBSA is a not for profit organisation formed for the benefit of its members around the world.

# Reasons for Corporate Migration

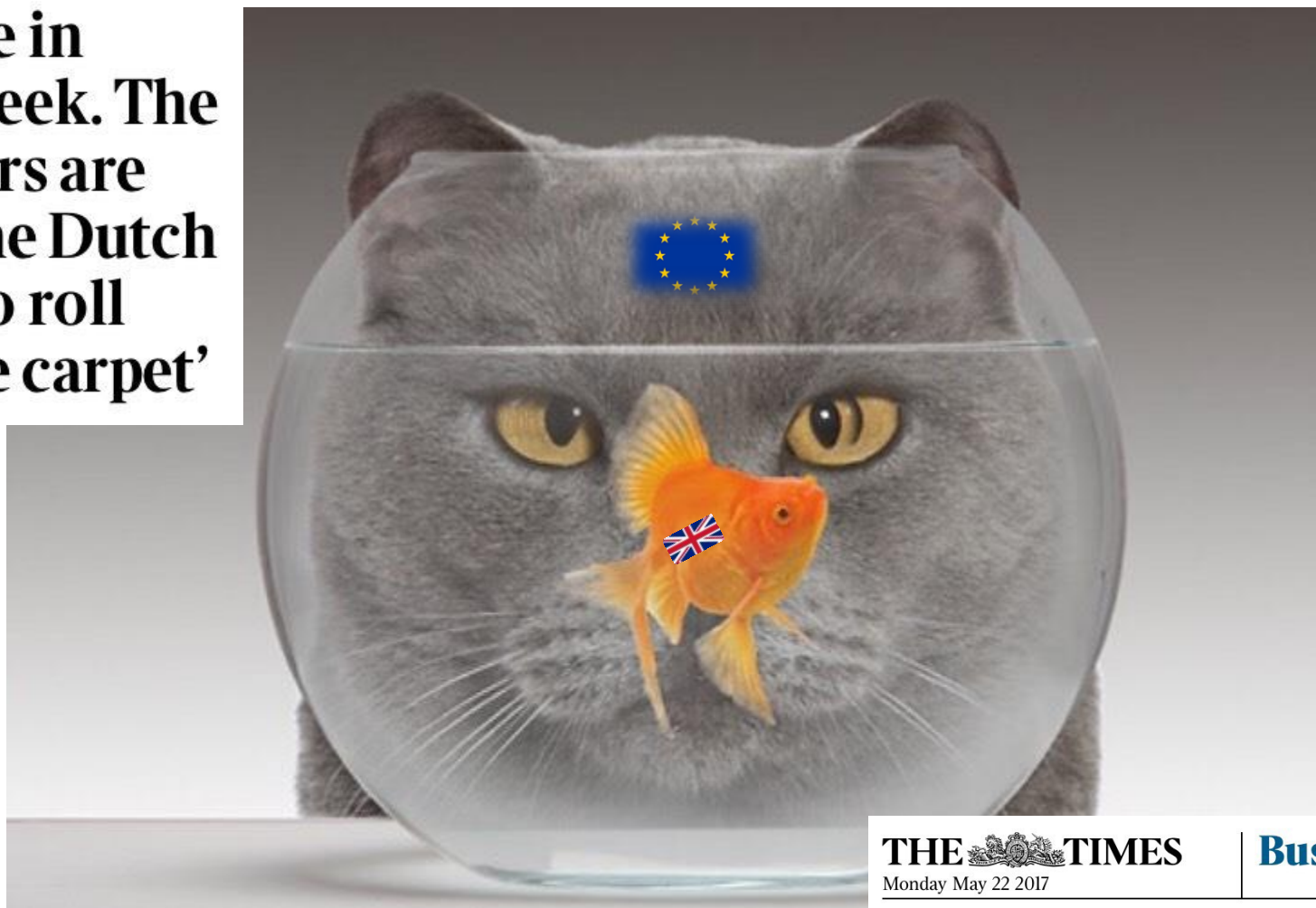
- **Business continuity**
  - A migrating company may remain intact with unbroken corporate history
  - Shareholders do not need to crystallise gains and reinvest in assets
- **Streamlining corporate structure and operations**
- **Planning for changes in laws and tax treaties**
  - Protection of foreign investors
  - Corporate law regime
  - Tax law: CFC, WHT, participation exemption, thin capitalisation
  - Better treaty network and international agreements (including the EU Directives and ECJ case law)
- **Joining substance and the shell to gain treaty benefits**
- **Improving image** (e.g. in preparation for an IPO; anti-avoidance)
- **Personal reasons** (esp. owner-managed companies)



“Brexit means Brexit”

Theresa May 2016

**‘The Irish were in London last week. The Luxembourgers are coming and the Dutch have started to roll out the orange carpet’**



**THE TIMES**  
Monday May 22 2017

**Business**

**City firms busy making plans  
as the Brexit clock ticks down**

# UK Labour Party Manifesto 2017...

*“...Corporation tax in the UK is the lowest of any major developed economy. Our new settlement with business will ask large corporations to pay a little more while still keeping UK corporation tax among the lowest of the major developed economies”*

# EU PRIMARY LAW

- FREEDOM OF MOVEMENT OF PERSONS (ART. 21 TFEU)\*
- FREEDOM OF MOVEMENT OF WORKERS (ART. 45 TFEU)\*
- FREEDOM OF MOVEMENT OF GOODS (ART. 28 TFEU)
- FREEDOM OF ESTABLISHMENT (ART. 49 TFEU)
- FREEDOM TO PROVIDE SERVICES (ART. 56 TFEU)

# EU SECONDARY LAW

- PARENT SUBSIDIARY DIRECTIVE (2011/96/EU)
- INTEREST-ROYALTY DIRECTIVE (2003/49/EC)
- MERGERS DIRECTIVE (2009/133/EC)
- MUTUAL ASSISTANCE IN RECOVERY OF CLAIMS (2010/24/EU)
- SIXTH VAT DIRECTIVE (2006/112/EC)



# CJEU (ECJ) CASE LAW

- CADBURYS SCHWEPPE (C-196/04) – domestic control foreign corporation rules
- GROUP LITIGATION (FII/Thin Cap) (C-446/04) – group taxation relief
- CENTROS (C-212/97) – corporate mobility
- MARKS AND SPENCER (C-446/03) – cross border tax relief/deductions on losses
- PHILIPS ELECTRONICS (C-18/11) – cross border tax relief

# CHANNEL ISLANDS AND ISLE OF MAN

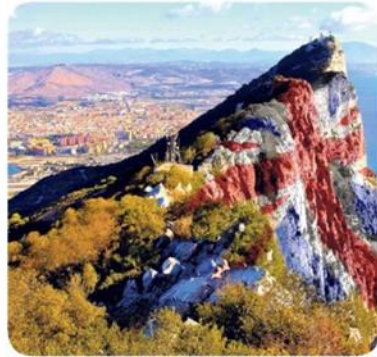
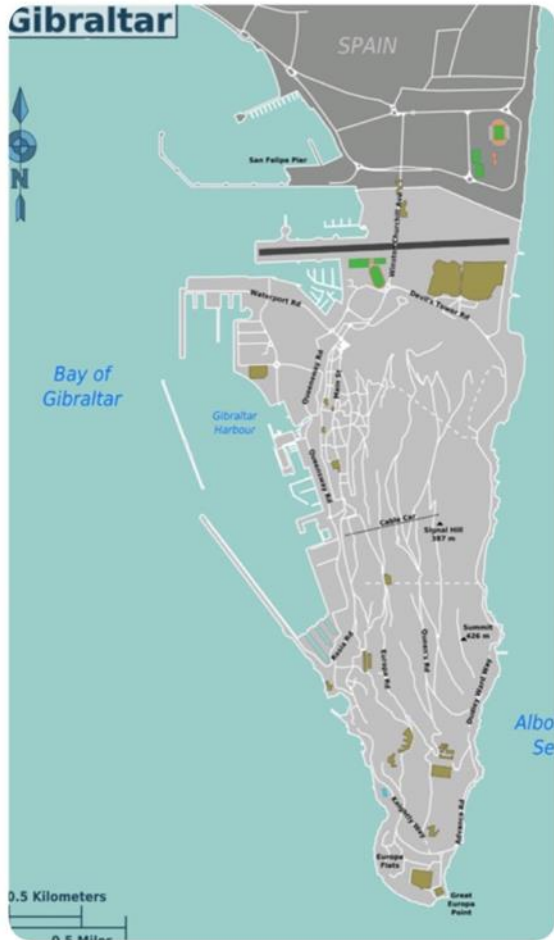
- Art. 355 (5)(c) TFEU: ‘

*The Treaties shall apply to the Channel Is. and the IOM only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of the member state.....’*

- Protocol 3 to the UK’s Act of Accession to the EU:

*‘Such persons shall not benefit from the Community provisions relating to the free movement of persons and services...’*

# GIBRALTAR...



Art. 355 (3) TFEU: ‘The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible.’

DEROGATIONS: (Customs and Goods)

# Re-domiciliation of a UK Company...



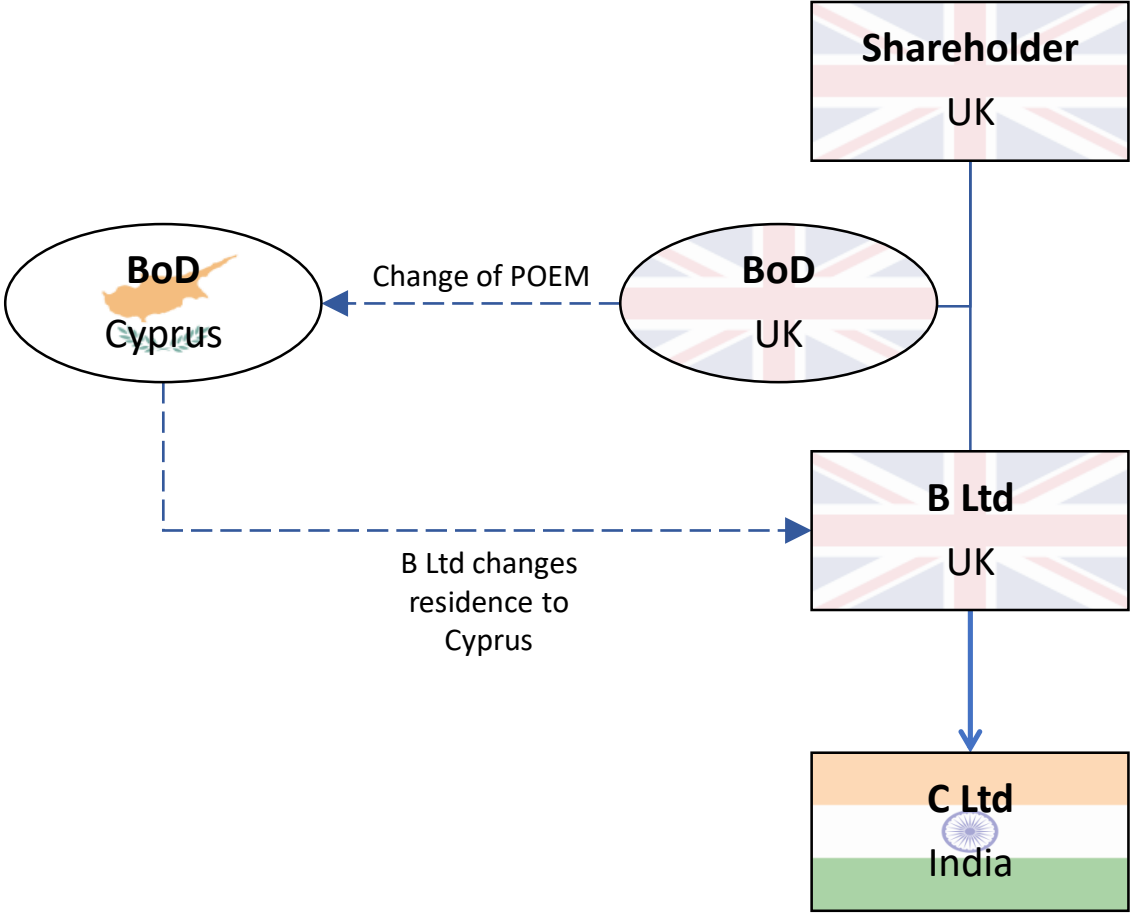
# Alternative methods of migration

- **Winding up and reincorporation**
  - Most tax inefficient
- **Transfer of legal domicile**
  - Not universally accepted
- **Transfer of place of effective management (POEM)**
  - Subject to substance requirements, but the least complicated and achievable under double tax treaties
- **Share for share exchange**
  - May constitute a taxable disposal
- **Merger migration under EU law**
  - Migration into the EU is regulated by national laws
- **Societas Europaea**

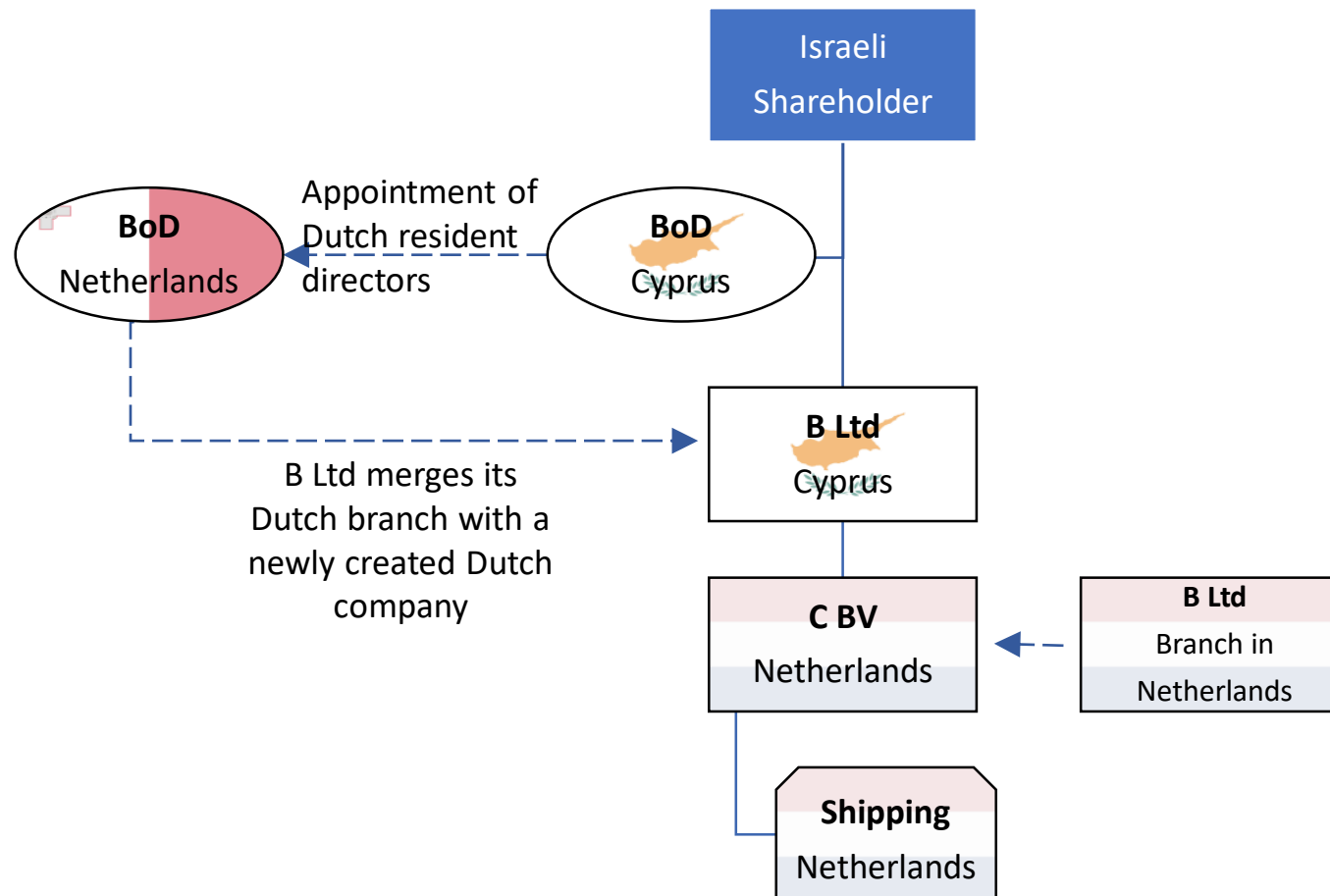
# Associated Risks

- Deemed realisation of gains if deemed liquidation
- Exit taxes on migration
- Potential VAT on asset transfers
- Real estate transfer taxation
- Cancellation of losses brought forward
- Substance requirement in the host jurisdiction

# Transfer of POEM (from the UK to Cyprus)

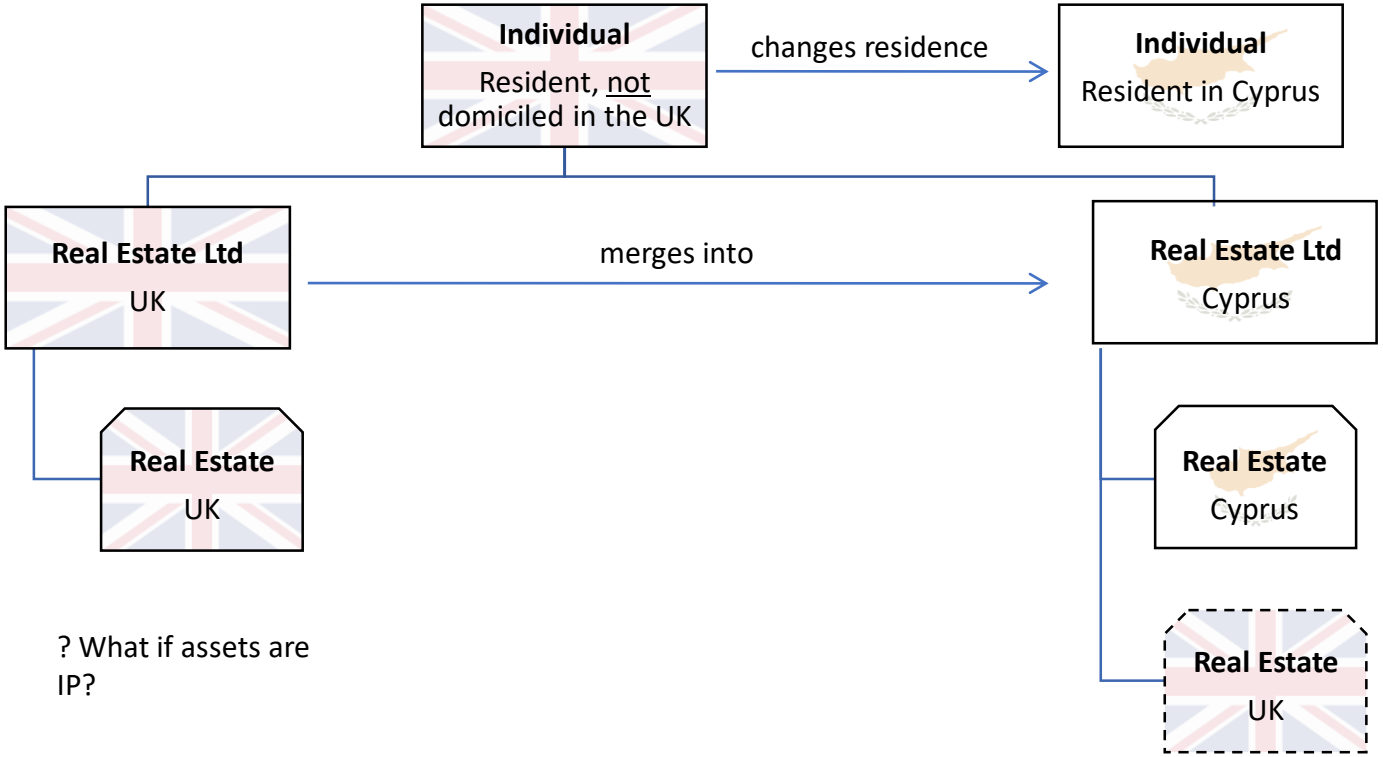


# Migration of Company (from Cyprus to Netherlands)



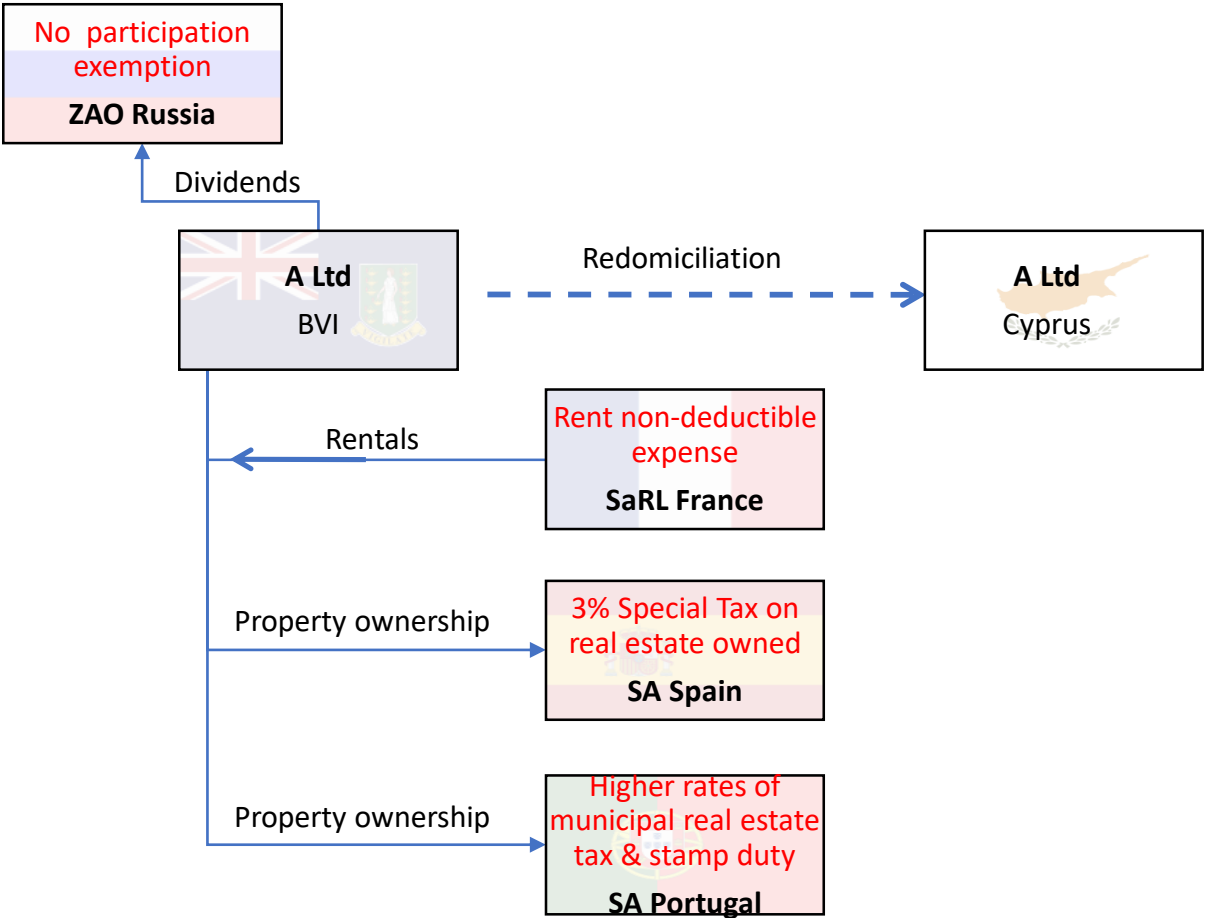


# Migration through merger — UK to Cyprus



? What if assets are IP?

# Transfer of Domicile (from BVI to Cyprus)





- **Management and Control (Cyprus)**
- Management and Control (Origin)
- Management and Control (International aspects)

## M&C traced back to 1961

✓ There is no definition in the Cypriot tax legislation of what are the management and control requirements and no detailed guidelines have been issued by the Cypriot tax authorities.

It is generally accepted and in line with international tax principles that the following conditions should be considered to determine if a company qualifies as a resident for tax purposes of Cyprus:

- a. Board meeting are taken place and deciding
- b- Directors (Majority) to be CY resident in Cyprus for day to day decisions

## What is the M&C Test?

- ✓ It is a test for residency of corporations  
(tendency to have more than one test; Incorp. (US), PO Principal Activ. (Italy), place of head office (Japan), place of controlling shareholding (Greece))

## Why residency is important ?

- ✓ Countries can only tax based on source and residency factors
- ✓ Unlocked Dtt

## OECD Model Tax Convention on Income and Capital

- Art. 6(1) Income **derived by a resident** of a Contracting State ...
- Art. 7(1) The profits of **an enterprise of a Contracting State** ...
- Art. 10(1) Dividends **paid ... to a resident** of the other Contracting State ...
- Art. 11(1) Interest ... **paid to a resident** of the other Contracting State ...
- Art. 12(1) Royalties ... **beneficially owned by a resident** of the other Contracting State
- Art. 13(5) Gains ... taxable only in the Contracting State of which the **alienator is a resident**
- Art. 15(1) ... remuneration **derived by a resident** of a Contracting State ...
- Art. 16 ... fees ... **derived by a resident** of a Contracting State ...
- Art 17(1) ... income **derived by a resident** of a Contracting State ...
- Art 18 ... pensions ... **paid to a resident** of a Contracting State ...
- Art 21(1) Items of income **of a resident** of a Contracting State ...
- Art. 22(4) ... capital **of a resident** of a Contracting State ...
- Art 23A(1), Art 23B(1) Where **a resident** of a Contracting State derives income...



**Access  
treaty benefits**

## ➤ What is the Management and Control test ?

### ➤ Some history : The common law countries, countries that law derived from the UK, historically did not use the place of incorporation.

-UK didn't use place of incorporation until 1988. Instead UK used a case law based test, history here is straight forward. When income tax was first introduced, corporations were very rare wasn't until the 1840 that it was easy to incorporate companies in the country, so relatively few corporations the income tax law was devised in the concept of individuals and was no definition of residents of individuals and was not a definitions for resident company.

- In the late 90th century questions start to come up as to whether a company was resident in the UK or not and eventually a leading case went to the house of lords that's is the case of De beers consolidated mines and that remains the leading common law case on this topic and is been followed in many other common law countries around the world.

So is the base for the law historically in Australia, Irelands in New Zealand, Cyprus and in other common law countries etc.

### ➤ Debeers consolidated minds (1906)

-De beers had to determine where a company incorporated in the UK but whose business was exclusive in South Africa, De beers business activity was mining diamonds out of the grounds in kimbelli /South Africa but the board of directors of De beers met in London. And the question was whether this company is resident in the UK for tax purposes?

-The member of the House of Lords rule an analogy of an individual.

-Virtual always interpreted as the place where the board of directors is. CM&C if is the directors who are controlling and managing the company it is where that those directors meet.

I-s a test that can be easily manipulated. Very carefully considerations. When I am advising clients usually every years. Is not a therotetical test ir rather a practical and curcial for itner. Taxx.

### ➤ A very recent case in Australia (few months ago) (by water Investment)

➤ Effective Management

VS

➤ Management and Control test

- Common to be a dual resident company (what do you do?)
- There is the tendency to say that management and Control test is not the same, effective for day to day
- Was supported by Smalood case - do not mean the same thing
- However big confusion , depending who you are we will see some examples form IFA 2004
- BEPS will change completely (the competent authorities will decide but (how to decide ?)



## ➤ Place of Effective Management

2000:

*The place of effective management is the place where 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*

2008: *The place of effective management is the place where*

*relevant facts and circumstances must be examined to determine the place of effective management. An entity may have more than one places of management, but it can have only one place of effective management at any one time*

2017: *BEPS action 6: Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Convention, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. ”*

State B



- Open an office
- Quote shares in the Stock Exchange
- Board of Directors (including CEO and VPS)
- The B. of D takes decisions based on the proposal of the senior executives

State A



- Incorporated
- Performing Mining activities
- DAY TO DAY management
- Senior executives (CEO and VPs)



- Cyprus – M&C (Origin in De beers 1906) – (“Mind”)
- M&C (facts & Circumstances test) every year case
- Effective Management (check treaty partner interpretation)
- Ensure don’t trigger more than 1- residency test

Thank you

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