Corporate residence has been a hot topic in the last eighteen months or so, particularly in the context of the recent corporate migrations or “inversions”. Various UK listed companies have inserted non-UK incorporated holding companies which are intended to be “centrally managed and controlled” from outside the UK, and so not be resident in the UK for tax purposes. These transactions will undoubtedly be carefully scrutinised by HMRC. Its recent victory before the First-Tier Tax Tribunal in Laerstate BV v HMRC [2009] UKFTT 209 (TC) will therefore be likely to generate some excitement.

The Facts
The principal player in the drama described in some detail in the Tribunal decision was a German businessman named Mr. Dieter Bock. Dieter Bock was the businessman who, for a few years in the early 1990s, replaced the late “Tiny” Rowland as Chief Executive of Lonrho Plc.

Laerstate BV (“BV”) was a Dutch company wholly-owned by Mr. Bock. In December 1992, at the instigation of Mr. Bock, BV acquired a substantial stake in Lonrho. Shortly afterwards, Mr. Bock was appointed CEO of Lonrho, and he subsequently acquired the use of a flat in London and appears to have become UK tax resident.

Nearly four years later, in November 1996, BV sold its shareholding in Lonrho to Anglo American Corporation (“Anglo”) at a profit. The existence of this potentially taxable gain was one of the reasons why HMRC wanted to show that BV was UK tax resident: and it raised assessments accordingly. BV appealed against those assessments in November 1997 and - a staggering twelve years later - the case came before the Tribunal.

The case therefore focused on events taking place between late 1992 and late 1996, being the period of Mr. Bock’s involvement in Lonrho. During this period, Mr. Bock, who travelled extensively on business, spent around one-third to one-half of each calendar year in the UK.

For most of this period, BV had two directors: Mr. Bock and a Dutch businessman named Mr. Trapman. In August 1996, however, Mr. Bock resigned as a director ofBV leaving Mr. Trapman as the sole director of BV. Although evidence was given that there were other reasons for Mr Bock’s resignation, the Tribunal suspected “that he had concluded that he should not be a director at the time of the disposal of [BV’s] shares in Lonrho”.

In summary, however, the acquisition by BV of its holding in Lonrho and the subsequent disposal of that holding to Anglo involved (as might be expected) extensive negotiation and general commercial toing and froing. Matters were further complicated by the parties’ entering into certain option agreements before any actual purchase or sale took place.

Mr. Bock was actively involved, whilst in the UK, in all of those negotiations and commercial activities. To a limited extent, BV went through the motions of holding board meetings outside the UK to approve some aspects of the transactions. For the period when BV had two directors, some of those board meetings were attended by both directors; many, however, were attended solely by Mr. Trapman. But plenty was happening outside those board meetings: and the driving force behind those happenings was Mr. Bock.
The general impression given by the Tribunal judgment is that Mr. Bock treated BV as his corporate alter ego, rather than as a substantive legal entity with its own rights and obligations. On more than one occasion, for example, Mr. Bock referred, in correspondence, to BV’s shares in Lonrho as “my” shares in Lonrho.

**Bock as director**

The Tribunal looked in some detail at the travel records of Mr Bock, and also at correspondence and the internal notes of BV’s solicitors. From this material the Tribunal pieced together what decisions Mr Bock made on behalf of BV, and crucially whether he was in the UK when these decisions were taken. The Tribunal also noted that, under BV’s articles, an individual director was authorised to represent BV and to create legally binding obligations on BV’s behalf, and therefore that Mr. Bock was entitled to do business on behalf of BV.

On the basis of this, the Tribunal concluded that, for the period when Mr. Bock was a director of BV, Mr. Bock “...himself conducted the business of [BV]...”. While Mr. Trapman may have co-operated and concurred with Mr. Bock where this was required, his role was found by the Tribunal to have been “...very much secondary to that of Mr. Bock, who was responsible for all the negotiation and strategic decisions on matters affecting [BV]...”. The consequence was that, throughout this period, Mr. Bock “...carried out activities of [BV] of a strategic and policy nature and managed the business of [BV]...and did so to a substantial extent in the UK...”.

Despite that, the fact remained that, during this period, BV did hold some board meetings outside the UK, at which some important management decisions were taken. The minutes of those meetings were, however, not as helpful as they might have been to the taxpayer’s position. There was nothing in them to suggest that there was any real debate about, or conscientious consideration of, the matters before the meeting. In fact, on some occasions the minutes showed a misunderstanding of important details of the transactions being approved.

The taxpayer clearly put a great deal of weight on the board meetings, arguing that it was only the decisions taken at these meetings that constituted central management and control, presumably relying on the Court of Appeal decision in Wood v Holden [2006] STC 443. The Tribunal, however, concluded that the decision in Wood v Holden was not relevant for the period when Mr Bock was a director. Mr Bock had the authority, as director, to exercise management and control of BV, and as a matter of fact Mr Bock did so exercise such management and control. Whilst it was accepted that the fact that Mr Bock was UK tax resident did not of itself mean that BV was UK tax resident, as a matter of fact Mr Bock had habitually exercised management and control of BV outside of board meetings when he was in the UK.

The Tribunal held that the “central management and control” test “… does not confine itself to a consideration of particular actions of the company, such as the signing of documents or the making of certain board resolutions outside the UK if, in a given case, a more general overview of the course of business and trading demonstrates that as a matter of fact central management and control abides in the UK ….”. The decision in de Beers Consolidated Mines v Howe made it clear that “…the actual question must be considered ‘upon a scrutiny of the course of business and trading’...”.

Proceeding from there, the Tribunal agreed that some management and control of BV’s affairs was indeed being exercised at the occasional board meetings held outside the UK. However, in a case where one director was so actively involved in conducting the business of the company between those board meetings, the Tribunal considered that it was incorrect to look at those board meetings alone in order to determine where central management and control of BV’s business was being exercised. The right approach, rather, was to have regard to the whole “course of business and trading”. When that approach was adopted, it was clear that a great deal of central managing and controlling was going on outside BV’s sporadic board meetings: and that this was being done very largely by Mr. Bock, in the UK, through his extensive involvement there in “…policy, strategic and management matters...” concerning BV.

On that basis, the Tax Tribunal found that BV was resident in the UK for tax purposes for that part of the period under review when Mr. Bock was a director of BV.

**Period after Bock’s resignation**

As to the period after Mr. Bock’s resignation as a director of BV, the Tribunal seems effectively to have found that Mr. Bock was, to all intents and purposes, still making all the management decisions in relation to BV’s affairs, and therefore nothing had changed.
The Tribunal thought that the decision in Wood v Holden was relevant for this period, because Mr Bock no longer had the legal authority to bind BV. During this period, Mr. Trapman may have made the formal decisions as the sole remaining director of BV, but the Tribunal concluded that he did so without giving any consideration to the issues at all.

Wood v Holden tells us that "...ill-informed or ill-advised decisions taken in the management of a company remain management decisions...", but in the Tribunal's view, Mr. Trapman was not even making ill-informed or ill-conceived decisions about BV's business – he was making no decisions at all, because he did precisely as he was told by Mr. Bock. BV was, therefore, being managed and operated in just the same way as it had been when Mr. Bock was on the board and the company therefore remained resident for tax purposes in the UK.

Place of Effective Management
The Tribunal also needed to consider whether the UK-Dutch Treaty, which contained a tie break provision where a company was otherwise considered to be resident in both the UK and the Netherlands, affected this conclusion due to section 249 Finance Act 1994 (now section 18 CTA 2009). The tie break looked to where a company's "place of effective management" was situated. The Tribunal concluded that, as Mr Bock's activities were concerned with policy, strategic and management matters, and that this represented the real top level management of BV, BV's place of effective management was also in the UK.

Conclusions
So, what lessons are there to be learned from this decision?

We must, of course, be careful not to lose sight of the fact that this was only a decision of the First-Tier Tribunal. In Wood v Holden, the taxpayer lost equally resoundingly before the Special Commissioners, but went on to win before the High Court and the Court of Appeal.

The Tribunal also specifically confirms that the fact that one of BV's directors was UK resident did not of itself make BV UK tax resident. The crucial factor was how the company was in fact run.

The relevant question is, however, where decisions are made. Wood v Holden tells us that ill-informed or ill-conceived decisions are still good decisions for these purposes, but if the Board is not really making decisions at all, and such decisions are being made elsewhere, then central management and control will not vest with the Board.

The taxpayer's case here was not helped by a number of factors. It was unfortunate that BV's articles gave Mr Bock the authority to bind BV when acting alone. It was also unhelpful that the taxpayer could not prove that Mr Trapman was given all the information required to make decisions, or did indeed make decisions on behalf of BV. And it would have been helpful if Mr Bock had attended more board meetings, rather than leave it to the Court to decide whether decisions were taken by Mr Bock in London, or by Mr Trapman, sitting alone in a "meeting" in the Netherlands, without the benefit of having Mr Bock present to provide the relevant background information.

The Tribunal also placed considerable weight on the fact that others (including BV's lawyers) seemed to assume that Mr Bock's decisions would bind BV, and there was evidence of Mr Bock at times seemingly forgetting that BV was not just his alter ego, but was a separate person.

Even if the Tribunal's decision is upheld by the higher courts, it will not by any means mean that a UK resident cannot be a director of a non-UK resident company, or that certain activities that fall short of central management and control cannot be carried out in the UK. But it is a useful lesson in how such a company needs to be run (and how this should be evidenced) in order to ensure that problems do not arise.

In the context of multinationals, this is perhaps less likely to be an issue for non-UK resident listed parent companies, where best practice in corporate governance, and the involvement of non-executive directors, mean that it should be clear that all important decisions are taken at board level. It is, however, more of a concern for wholly-owned subsidiaries, where there may be a temptation to blur the role of the subsidiary with that of the wider group.