Question 1

Part 1

UK corporate residency status is based on two factors:

- UK incorporation – not applicable to this situation

- Central management and control (CM&C) – If this is carried out in the UK then the company will be considered to be UK resident.

What CM&C is has been considered in a number of tax cases. The concept was first established in the De Beers case. Case law has given rise to guidance on the factors that will determine central management and control. HMRC have issued guidance on this at SP 1/90. Some of the factors are as follows:

- Generally considered to be highest level of decision making, typically at board meeting.

- However this will only be the case if board meetings are where the decision are made – it cannot merely be rubber stamping decisions actually made elsewhere (Unit Construction).

- The place board meeting are held will be important.

HMRC in SP 1/90 suggest the following approach:

i) Ascertain whether the directors in fact exercise CM&C.

ii) If so, determine where directors exercise CM&C (not necessarily where they meet).

iii) Where directors do not exercise CM&C, establish where and by whom it is exercised.

Metrol SA

Board meetings are currently held in France where key decisions are reached.

However when Raymond becomes UK resident the proposal is for Raymond to join board meetings from London. If Raymond is making most of the key decisions then this could give rise to a risk that HMRC will consider CM&C being in London. It is noted that Raymond owns 100% of Metrol SA (indirectly through the BVI company). As a result even though other directors may be in Paris, if it is shown Raymond makes the key decisions this could result in UK CM&C.

It is noted that Raymond has significant involvement in the French business. With regard to refinancing, it notes that Raymond will be negotiating the position. Following approach in SP 1/90:

i) Are directors exercising CM&C? Is it mainly Raymond? Further facts will be needed to confirm.

ii) Where are Directors exercising CM&C? London for Raymond.

iii) If not Directors, who exercise CM&C? If not Directors as a whole, likely Raymond, who would be based in the UK.

There are therefore significant risks of the company having UK CM&C. See 2) below for ways to mitigate risk.

If the company is deemed UK resident through CM&C, then the UK/French treaty is likely to have a tiebreaker test based on where the effective management takes place. If Raymond is taking day to day decisions then again this could lead to UK residency.

<u>Metrol BVI</u>

it is noted that the Board of Directors rarely meet. This suggests that CM&C on the company is not taking place at Board meetings. Using the approach above:

i) Are Directors exercising CM&C? Appears not to be exercised at Board Meetings as they are rarely held.

ii) Not applicable if Directors not exercising CM&C.

iii) If not Directors who is exercising CM&C – this will need to be determined further, although given that Raymond is 100% owner, it is assumed that Raymond is exercising CM&C.

If Raymond becomes UK resident it is therefore likely that BVI will become UK resident.

<u>Guernsey company</u>

It is noted that the investments of this company are constantly monitored by Raymond. It is not known the pattern of board meetings but if high level decisions are being made by Raymond while he is in the UK, then UK residency will apply under the CM&C test.

<u>Part 2</u>

The following are some of the steps Raymond could take to ensure the companies do not become UK resident.

<u>Metrol SA</u>

- Join board meetings in Paris in person.
- If Raymond does join remotely ensure this is infrequent.
- Ensure that board minutes document the key decisions that are being made during the Board meeting.
- Ensure that not all decisions are made by Raymond and this is documented.
- With regard to refinancing, Raymond is involved in the negotiations. Any report to the Board should not be rubber stamping decision Raymond has made in the UK. It will need to be considered by the Board as a whole.

<u>Metrol BVI</u>

- Have regular Board meetings, not in the UK.

- As above, demonstrate in board minutes that decisions are made at the meetings (rather than rubber stamping).

- Consider appointing more Directors based in BVI.

Guernsey company

- Ensure Board meetings take place outside of the UK.

- Demonstrate key decisions being taken at these meetings.

Part 3

A Permanent Establishment (PE) will exist in the UK in two circumstances:

i) Where a company has a fixed place of business in the UK through which the business of the company is wholly or partly carried on; and

ii) An agent acting on behalf of the company habitually exercises authority to do business on company's behalf.

There are risks of a PE under both criteria:

Fixed place of business

If Raymond lives and works in the UK, will there be a fixed place of business through which he operates? If Metrol provides office space this is likely to meet this test, unless it can be demonstrated that the work carried on by Raymond is auxiliary and preparatory to the company's business. if Raymond is a key Director the work is unlikely to be of this nature.

If no office is provided but he works from home, this is more of a grey area. It could be argues that an individual's home is not at the disposal of a business. Draft guidance (not yet in force) on home working suggests that regular and continuous use of home could lead to a fixed PE.

Agency

It is noted that Raymond is planning to 'reach out' to the group's UK customers. If this reaching out gives rise to any contracts being concluded in the UK this is likely to give rise to a PE.

Indeed, even if contracts are not concluded but significant activity is undertaken in the UK by Raymond, then from April 2015 a diverted profits tax could apply on any 'avoided PE'.

Question 2

Introduction

It is a fairly common view that multinational companies are able shift profits and reduce their taxes, for example by operating in low tax jurisdictions, or having a complicated group structure, which gives rise to an advantage over domestic businesses.

There has been significant public and political interest in this in recent years, for example, with regards to tax arrangements of Google, Starbucks, and Amazon. This has also been the case at an international level, and has resulted in new initiatives such as OECD Base Erosion and Profit Shifting (BEPS) project.

However, there is significant anti-avoidance legislation in place, together with new legislation coming in that tries to ensure there is more of a 'level playing field'. This legislation is discussed below:

Controlled foreign companies (CFC) Part 9A TIOPA 2010

Rules are in place to prevent companies from diverting activities from the UK and operating through companies in low tax jurisdictions. The rules work by apportioning profits of companies that don't meet the exemptions and have profits that pass through 'gateways', to the UK company.

The rules are seeking to ensure that the equivalent UK tax is paid on profits that are being artificially diverted from the UK.

Permanent establishments (PE)

It is often believed that if a company operates through a low tax jurisdiction then it will not be subject to UK tax. However permanent establishment rules ensure that if a non-resident company is either operating through a fixed place of business in the UK, or carries out business through a dependent agent, they will be liable to UK tax.

The UK tax paid is based on profits that would be attributed to the UK activities if it was a separate and distinct enterprise.

However there has been controversy that companies are able to set up arrangements that fall short of a PE being created hence only paying tax in country of residence. This has been addressed to some extent by diverted profit tax (see below).

Transfer Pricing Part 4 TIOPA 2010

If a UK resident company pays for services or goods from an overseas connected company, then if it pays a price that is above what would be paid from an unconnected company, this could give rise to a UK tax advantage. This is because profits would be artificially reduced.

However transfer pricing seeks to ensure prices are based on arm's length rate. Companies must document why a price has been selected and demonstrate that it is arm's length. The rules apply to all transactions such as :

- Services
- Goods
- Loans {rates, terms and amounts]

- Intellectual Property
- Intangibles

Thin capitalisation

Thin capitalisation rules are linked to transfer pricing. They ensure that companies are not 'excessively' leveraged. If a company has a level debt that would not arise had it lent from a third party, then the excess interest is not allowed as a deduction.

BEPS

The BEPS initiative is looking at a number of issues with work due to be completed in the next couple of years. The issues under consideration are seeking to address some of the outcry around multinational perceived avoidance. Issues under consideration include:

- Hybrid mismatches
- CFC rules
- Preventing artificial avoidance of PE
- Transfer pricing methodologies
- Agressive tax planning

Diverted profit tax

The diverted profit tax was introduced from April 2015. It was brought in to address two situations:

i) Where there are arrangements in place designed to achieve an 'avoided PE'. This could be for instance where there is activity in the UK but it falls just short of requirements of PE legislation.

ii) Where there are transactions which take place between related parries which lack economic substance.

If the conditions are met a separate tax of 25% is applied to the profits in scope. The higher rate than corporation tax is considered to be to give companies an incentive to ensure arrangements are within the charge to corporation tax, e.g. report a PE.

Arbitrage

Rules are in place which seek to prevent deductions for interest where hybrid structures are being used to either secure double deductions or untaxed income.

Treaties

Treaties seek to prevent tax avoidance in international structures by having a general interpretation that they should not be used for tax avoidance. Additionally, there are clauses which seek to ensure reduced withholding tax rates can only be used where a company is the beneficial owner.

Other

- General anti abuse rules – seek to disregard structures where UK tax avoidance is one of main purposes.
- Information exchange – considerable efforts in recent years to improve information exchange between countries. This should help with avoidance.
- Unallowable purpose – deduction not allowed for loans where there is not a commercial purpose for the loan.

Conclusion

There are a significant number of anti-avoidance measures in place which try to ensure an even playing field. Recent initiatives on diverted profits are seen as addressing some of the scenarios played out in the media, with the new tax being known as 'the google tax'. However there is more that needs to be done to address this issue. Further initiatives will be coming out in the next few years as a result of the BEPS project which is welcome.

However, care will need to be taken to ensure that multi nationals do not end up being disadvantaged by ending up with double taxation with difficulty agreeing any double tax relief between States.

Question 4

Part 1

There are three concepts of domicile that need to be considered:

- Domicile of origin – a domicile of origin is one which is inherited from (usually) the father at an individual's birth.

- Domicile of dependence – until the age of 16 a child will have the domicile that their father has. As a result if the father's domicile changes after the child is born, then the child's domicile will follow until the age of 16.

- Domicile of choice – a domicile can change based on the facts. This will be covered further below.

Domicile of origin

Peter was born in 1961. It is likely that at this time Peter's father had a Swiss domicile. This was where he was born and had lived until 1960. Although Peter's father had moved to London in 1961 at the time of the birth it is unlikely that a UK domicile would have been established. One of the main criteria for changing domicile is that an individual has a intention to permanently settle in the new country.

This permanent intention to settle in the UK is unlikely to have been met. As a UK domicile won't have been established the old domicile would remain. A domicile can only be removed once a new domicile is established.

Hence Peter's domicile of origin would be Swiss.

Domicile of dependence

Whilst a child it has been established that Peter's father took on a Dutch domicile in 1975 when Peter would have been 14 years old. As a result Peter would have taken on his father's domicile at this time, i.e. Dutch, based on the domicile of dependence.

Domicile of choice

As mentioned above a domicile can be changed if it is established that an individual has a settled intention to permanently reside in a country and has actually lived there. This has been established through a number of case law decisions, such as Re Clore, and Morgan v Cilanto, and the recent Gains Cooper case.

There are a number of criteria that HMRC will look at when determining if an individual has this settled intention.

At present Peter is living and working in the UK, hence HMRC may look closely at any claim that he is non-UK domiciled. They will be looking for evidence of a long term intention to remain in the UK. Factors they will look at are:

- Peter owns UK property.
- Peter has UK bank accounts.

- Peter's wife and children are in the UK.
- Peter has a UK passport (albeit a Dutch passport as well).

However on balance it is likely that there is not enough evidence to suggest that Peter is UK domiciled. There are not enough factors to suggest a change from the domicile of dependence which is Dutch. This is because of some of the following:

- Peter owns properties in other countries as well as UK, in particular in Holland.
- Peter has bank accounts in other countries (including Holland).
- His wife is Dutch and has Dutch family which suggests there would be good reasons for Peter to want to relocate to Holland after retirement.
- Peter spends a significant amount of time in Holland each year.
- It is indicated that Peter has maintained close ties with Holland.

In conclusion it is likely that Peter has retained his Dutch domicile at this point.

Part 2

A non-domiciled ("non-dom") but UK resident individual (which is Peter's likely status) will be subject to some specific rules compared to a UK resident and domiciled individual:

- A non-dom is able to claim a remittance basis for any non-UK income and gains. This means that the foreign income and gains will only come within the charge to tax if it is remitted to the UK. Otherwise no tax is due. A UK domiciled individual would have to pay on an arising basis.

- An individual must claim in the tax return for this treatment to apply (unless remittance are less than £2,000 per year in which case no claim is required).

- If a remittance basis is claimed no personal allowance or annual exemption is available.

- Once an individual has been UK resident for seven out of the last nine years, a £30,000 long term resident charge is applied if the remittance basis is claimed.

- At present an individual can make an election for this treatment on a yearly basis so can establish whether it is worthwhile to claim the remittance basis and pay the charge or pay on an arising basis. However there is consultation on whether this may change to a three year election.

- The charge increases to £60,000 (from Apr 15) once 12 out of 14 years of UK residency have passed and to £90,000 (from Apr 15) once 17 out of 20 years have passed.

- If income is remitted it is charged at non-savings rate. Any dividends remitted would not be charged using the dividend rate.

- Capital gains remitted are charged at 18% and 28%.

- The source of the remittance is subject to specific rules. If a remittance is from a mixed source account, there are rules set out on which income is treated as remitted first. This is income that has not been subject to foreign tax first.

- Any foreign losses can be claimed to be offset, however there are rules which mean that once an election is made, all losses (UK and foreign) must be set against unremitted gains before they can be set against amounts subject to UK tax. Hence this election is not always beneficial.

Part 3

Domicile is the important concept for inheritance tax and determines which assets will be within the charge. If Peter remains non-UK domiciled, he will only be subject to inheritance tax on UK situs assets.

These assets are currently as follows:

- UK home
- UK bank account

A nil rate band will be available (currently £325,000) to offset inheritance tax. The tax will then be charged at 40%.

Non-UK situs assets:

- Foreign portfolio of quoted shares
- Art and jewellery in Holland

If Peter moves the art and jewellery to the UK these will become UK situs assets and would be subject to UK inheritance tax.

It is worth noting that there are deemed domicile rules in place for inheritance tax. If Peter remains in the UK for 17 out of 20 years prior to death, then his domicile will be deemed to be the UK. This is the case even if under case law principles established above he is still Dutch domiciled.

This is not in point as yet but needs to be kept in mind.

Question 7

Part 1

In April 2013 the rules on residency changed with the introduction of a statutory residence test (FA 2013 Sch 45).

2012/13

It has been advised that Maxine is UK resident in this year under the old case law test (prior to the introduction of the statutory residency test).

2013/14

The statutory residency test has three main parts.

i) Automatic overseas tests – if one of these tests is met the individual is automatically non-UK resident and no further tests need to be considered.

ii) Automatic UK tests – if these tests need to be applied (if the automatic overseas tests are failed), then if one of them is passed, an individual will be automatically UK resident.

iii) Sufficient ties – if neither of the above are met, then the sufficient ties tests must be considered. The look at what ties an individual has to the UK.

Applying these tests to 2013/14 gives the following analysis:

i) Automatic overseas test
Maxine has been UK resident in one or more of preceding three years (2012/13), hence would need to spend less than 16 days in the UK or meet a full time overseas work test.

Maxine has spent more than 16 days. The question does not indicate overseas work information. Until this is verified it will be assumed that this test is not met.

ii) Automatic UK tests
These are as follows:

- Spends more than 183 days in the UK – not met.

- Individual has a home in the UK during all or part of the year. This was not the case.

- Full time UK work carried out – this test is not met.

iii) Sufficient ties
The number of ties that an individual must have in order to become UK resident is dependent on the number of days an individual spend in the UK and whether they are an 'arriver' or a 'leaver'. Maxine would be classed as a leaver as she was resident in one of three previous years. As Maxine has sent 55 days in the UK she needs three ties to be considered UK resident. These will now be considered in turn:

- Family tie – if spouse or minor child are UK resident. No information is given re a spouse so it is assumed for now this is not in point. Although her son is UK resident he is not a minor. Test not met.
- Accommodation tie – this is met if during a continuous period of 91 days accommodation is available. This test is met.

- Work tie – this test is met if the individual works at least 40 days in the UK. This is unclear and will need confirming. To confirm.

- 90 day tie – this is met if Maxine has spent more than 90 days in the UK in the preceding year, or year preceding that. This test is met.

- Country tie – this is considered as Maxine is a 'leaver'. This is met if Maxine spends more days in the UK than any other country. This is assumed not to be met but should be confirmed.

As a result Maxine potentially is UK resident if the work tie is met as there are two other ties which do apply. Maxine will need to confirm if the days spend in the UK were work days in the year.

<u>2014/15</u>

Applying the same tests as above to this year:

i) Automatic overseas test – not met due to days in UK. The full time overseas test cannot be met as it requires less than 90 days in the UK (she has 95 days).

ii) Automatic UK tests

- Spends more than 183 days in the UK – not met.

- Individual has a home in the UK during all or part of the year. It must be available for a period of 91 days. Although Maxine bought the house in December 14 so owns the house for this period of time, it only became inhabitable from March 15. As a result it is unlikely this test would be met.

- Full time UK work carried out – this test is not met.

iii) Sufficient ties
Maxine would be classed as a leaver as she was resident in one of three previous years. As Maxine has sent 95 days in the UK she needs two ties to be considered UK resident. These will now be considered in turn:

- Family tie – not met as above.

- Accommodation tie – this test is met as above.

- Work tie – again this would need to be confirmed. (Days spent working need to be more than 40.)

- 90 day tie – this is met if Maxine has spent more than 90 days in the UK in the preceding year, or year preceding that. This test is met due to days spent in UK in 2012/13 of 140.

- Country tie – again this is assumed not to be met but should be confirmed.

As Maxine has met two of the tie tests, she will be regarded as UK resident in 2014/15.

Part 2

If Maxine is considered resident in the UK and another country, e.g. France is mentioned in the question, then she may be resident under local country rules in both countries.

However the treaty provides a tie breaker test in this scenario. Article 4 on residence is in point here. For an individual residence between two states is determined based on the following criteria. If a test cannot determine residence the next test below is then considered:

- Where an individual's permanent home is. If this is in both States the individual's centre of vital interests (personal and economic relations) are considered.

- Habitual abode.

- Which State person is a national of.

- By mutual agreement.

In this case the home test may have been in point until Maxine bought the UK house. For future years Maxine's habitual abode may be in point.

Part 3

Overseas workday relief is available to an individual who has not been resident in the UK for the previous three tax years and is not UK-domiciled.

The relief is available for a three year period after an individual arrives in the UK.

The relief allows an individual to apportion UK and non-UK work days and to only bring into tax UK work day income.

The employee will be subject to national insurance on first principles if they are ordinarily resident in the UK.

However, if there is a reciprocal agreement in place with the individuals original country liability may not arise. Typical agreements between states allow a 1-5 year suspension, provided the individual is paying into home country system.

There is also a temporary period of one year where NI may not need to be paid if the employee comes from a non-agreement country subject to certain criteria.