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THE ESTABLISHMENT OF TAX RESIDENCE AND COVID-19:
From the Temporary Challenge to the Permanent Reality

Dissertation to obtain a Master's Degree in Law,
in the specialty of Business Law and Technology.

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ANTI PLAGIARISM STATEMENT

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DECLARATION OF THE NUMBER OF CHARACTERS

The body of this dissertation, including spaces and notes, occupies a total of 199 909 characters.

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The citations appear complete in the first reference to the work and for subsequent indications, there is only a mention of the author, title, and page in the references. In consecutive references, the expression *ibidem* is used to mean the same work and the same page, and *idem* with mention to the page if it does not coincide.

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The structure of this dissertation requires us to use an abbreviated citation system and abbreviations throughout the text. A list of abbreviations can be found at the beginning of this master's dissertation.

This dissertation was written in English language, and words written in the body of the text in foreign language and Latin are highlighted in italics.

Additionally, most of the foreign works have been consulted in their original language. In case of translations, it was the responsibility of the author of this dissertation.

ACRONYMS AND TECHNICAL TERMS LIST

BEPS - Base Erosion and Profit Shifting

DTC - Double Tax Conventions

EU - European Union

ITL - International Tax Law

MAP - Mutual Agreement Procedure

MNE – Multinational Enterprise

MTC - Model Tax Convention

OECD - Organization for Economic Co-operation and Development

OECD MTC - OECD Model Tax Convention on Income and on Capital

PE - Permanent Establishment

TA - Tax Authority

TEU - Treaty of the European Union

TFEU – Treaty on the Functioning of the European Union

CJEU - Court of Justice of the European Union

UN - United Nations

MS – Member State

UK – United Kingdom

US – United States

ABSTRACT

The primary objective of this dissertation is to comprehensively examine and analyse the international tax implication resulting from the SARS-CoV-2 virus, particularly the challenges posed in the field of tax residence. This analysis is conducted based on the criteria established in the Organization for Economic Co-operation and Development Model Tax Convention on Income and on Capital (hereinafter, OECD MTC).

In early 2020, the emergence of the COVID-19 virus dramatically changed the world. The World Health Organisation officially declared the disease as pandemic, and since then, countries have implemented unprecedented public health measures, such as mandatory confinements, lockdowns, and restrictions on international travel.

At first, the tax measures adopted to mitigate the impact of such restrictions were focused on tax processes, the delay of tax returns and the digital enablement of administrative operations. However, in this master's dissertation our investigation focused on the impacts of the pandemic and guidance issued in regards of international taxation and tax residence.

In this manner, the qualification and attribution of tax residency is of particular importance in the various tax systems and in the OECD MTC, as most States adopt a model of subjecting global income to taxation in relation to resident status.

This model convention is designed to avoid double taxation and includes the element of physical presence as essential for determining tax residence. As a result, tax residence determines the right of a certain territory to tax the income and/or assets of both individuals and companies. The analysis of tax residence, in this master's dissertation, is based on the criteria established in the OECD MTC.

The unprecedent circumstances created by the pandemic substantially disrupted the criteria used to establish tax residence. Criteria such as the physical presence of individuals, the place of central management and control of companies, and the duration of stays in specific territories were strongly shaken during the crisis leading to significant impacts on the taxation of the income and assets of taxable persons. The enforcement of these extraordinary measures, such as compulsory confinement, prohibition of free movement, and the closure of international travel created the risk of being of individuals and legal entities being considered tax residents in two or more jurisdictions. This reality triggered a need to temporarily (or not) adapt the determinant factors applicable for the establishment of tax residence.

In this regard, the possibility that this situation has highlighted the pre-existing need for re-evaluating certain criteria outlined in the OECD MTC, as well as reconsidering current interpretations, is analysed, alongside the impacts of COVID-19 on tax residency and on the DTCs in a post-COVID-19 Era.

Keywords: tax residence; COVID-19; OECD Model Tax Convention; double tax conventions.

RESUMO

A presente dissertação tem como objeto de estudo a analise das implicações internacionais fiscais resultantes do vírus SARS-CoV-2, em particular os desafios colocados no âmbito da residência fiscal. Esta análise é realizada tendo por base os critérios estabelecidos na Convenção Modelo da Organização para a Cooperação e Desenvolvimento Econômico, em matéria de imposto sobre o rendimento e sobre o património (doravante designada como CMOCDE).

No início de 2020, o aparecimento do vírus COVID-19 mudou drasticamente o mundo. A Organização Mundial de Saúde declarou oficialmente a doença como pandemia, e desde então, os países implementaram medidas de saúde pública sem precedentes, nomeadamente confinamentos obrigatórios, *lockdowns* e restrições a viagens internacionais.

Numa primeira fase, as medidas fiscais adotadas para mitigar o impacto destas restrições centraram-se em processos administrativos, atrasos nas declarações fiscais e na habilitação digital das operações administrativas. No entanto, o âmbito desta dissertação de mestrado focou-se nos impactos da pandemia e nas orientações emitidas em matéria de tributação internacional e residência fiscal.

Deste modo, importa ressalvar que a qualificação e atribuição de residência fiscal assume uma particular importância nos vários sistemas fiscais, e na CMOCDE, na medida em que a maior parte dos Estados adotam um modelo de sujeição dos rendimentos globais à tributação referente ao estatuto de residente.

Esta convenção modelo tem por objetivo evitar a dupla tributação, englobando também o elemento presencial como essencial para a determinação da residência fiscal.

Assim sendo, a residência fiscal determina o direito de certo território tributar o rendimento e/ou património seja de pessoas singulares ou de pessoas coletivas. A análise dos critérios de residência fiscal, nesta dissertação de mestrado, será tendo em conta os critérios estabelecidos na CMOCDE.

As circunstâncias extraordinárias criadas pela pandemia perturbaram substancialmente os critérios utlizados para o estabelecimento da residência fiscal. Critérios como a presença física dos sujeitos passivos, o lugar onde são efetivamente tomadas as decisões de controlo e gestão das pessoas coletivas (sede de direção efetiva) e a duração das estadias em certos territórios foram fortemente abalados durante a situação de crise vivenciada durante a pandemia, impactando significantemente a tributação do rendimento e património dos sujeitos passivos. A aplicação destas medidas extraordinárias, como o confinamento obrigatório, proibição de livre circulação, e o encerramento dos aeroportos criou o risco de ser atribuída a qualificação de residentes em duas ou mais jurisdições para efeitos fiscais. Esta realidade desencadeou a necessidade de adaptação temporária (ou não) dos fatores determinantes do estabelecimento da residência fiscal.

Neste sentido, é analisada a possibilidade desta situação ter enaltecido a necessidade pré-existente de reavaliação de determinados critérios da CMOCDE e/ou a reconsideração da sua atual interpretação, bem como os impactos do COVID-19 no conceito de residência fiscal e nas convenções modelo numa era Pós-COVID-19.

Palavras-chave: residência fiscal; COVID-19; Convenção Modelo da OCDE; convenções de dupla tributação;

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Chapter I - Introduction

The rapid global spread of COVID-19 prompted the World Health Organization to declare it a pandemic in March 2020.[1] Since then, practically all countries have experienced the pandemic's effects, and the majority chose to lock down their populations, namely through restrictions imposed on travel and strict confinements (broadly referred to in this dissertation as “public health measures”). This situation needed prompt action from the governments and policy makers to modify the tax system and quickly adjust them to the impacts of the pandemic.

This dissertation examines the consequences of the COVID-19 pandemic on international tax law (hereinafter, ITL). And more specifically, as one its foundations, and as concept that was highly challenged during the pandemic years the focus will be on the effects of COVID-19 on the establishment of tax residence for both individuals and legal entities. We make an effort to show if, and how the ideal implementation of the standards set for the distribution of taxing rights in the international context were distorted during this time.

In order to demonstrate such event, we analyze the concept of tax residence and its requirements, especially at light of the OECD MTC, and the impact of the public health measures on such concept. We intend to prove that the situations held as temporary or extraordinary produced effects in the application of the double tax conventions (hereinafter, DTC), namely in the establishment of tax residence, and that some of those effects may outline a deeper need of modification of ITL, and may become a permanent reality.

In this sense, we provide an overview of the tax response administrative measures adopted by eleven jurisdictions, including the position of non-European countries, in response to the challenges imposed by COVID-19. The jurisdictions analyzed were selected based on the OECD member status and availability of administrative guidance. Other criteria such as the level of novelty of the administrative guidance adopted in face of the one issued by the OECD, relevant administrative decisions presented by tax authorities (hereinafter, TA) in the matters at issue, and the different impacted areas of

1 World Health Organization, “WHO Director-General’s opening remarks at the media briefing on COVID-19 – 11 March 2020”, 2020.

tax residence that were taken into account when jurisdictions issued such guidance (e.g. focus on individuals, legal entities or cross-border workers issues) were also applied.

1.1. Methodology

In the delimitation of the problematic chosen, it should be noted that, without ignoring the ethical, philosophical, psychological, or sociological relevance of the object of study, our approach focused on the legal field with a dogmatic perspective. It is also essential to recognize that any research has to know limits, positive and negative, otherwise it will become inexhaustible and, therefore, unfeasible. With this methodological concern, our research delves in the fields of ITL and Corporate Tax Law, representing the two branches of legal science to be applied to the subject of study from an interdisciplinary standpoint.

As negative limitations, we underline that the approach was imminently dogmatic, not penetrating fields of a philosophical nature, and secondly that its scope is limited to the criteria and problems raised in the light of the OECD MTC[2] and does not include issues related to the United Nations (hereinafter, UN), or other MTCs.

The methodology adopted involves an investigation of a collection of doctrine and jurisprudence focused on the area of ITL, which allowed, after analysis and reflection, to concretize the problematic of the regime of the establishment of tax residence. In this sense, several national and international authors who have addressed these matters and issues were studied. This dissertation employs an empirical-dialectical model within a dogmatic research framework to raise and analyze theoretical and practical questions, ultimately seeking to add solutions.

Firstly, we addressed the concepts covered by the scope of this work, namely the definitions of ITL, residence and tax domicile, place of effective management, double taxation, and permanent establishment (hereinafter, PE). Secondly, and in order to raise concerns and provide new solutions, we analyzed the guidance issued by the OECD, as well as research and opinion articles published in a range of sources concerning the impact of COVID-19 on ITL.

2 This dissertation will analyze the requirements of the OECD MTC of 2017, published in 25th of April of 2019, available at https://www.oecd.org/tax/model-tax-convention-on-income-and-on-capital-full-version-9a5b369e-en.htm

1.2. Objectives

Prima facie, the purpose of this dissertation is the analysis of the impact of the pandemic caused by COVID-19, in relation to the criteria set out in the OECD MTC for the establishment of the tax residence of both individuals and legal entities covered by it.

This dissertation has as specific research objectives, the analysis of the criteria present in the OECD MTC for the establishment of tax residence vis-à-vis the pandemic situation experienced, the analysis of the impact of this situation on the concept of PE, including the notions of construction site projects, remote working and cross-border workers, the impact on changes of residence of individuals and legal entities, and also the analysis of the effects under the optics of application of the tie breaker rules.

It should also be noted as a specific objective the demonstration of if, and how these factual situations considered as temporary or extraordinary may lead to permanent situations that require the adaptation of ITL and of the criteria set out in the OECD MTC.

In short, the following questions will be answered and/or reflected upon:

a) What are the effects of the public health measures carried out by Governments on ITL, in particular on the establishment of the tax residence of taxpayers?

b) Were the OECD MTC's criteria and provisions adequate in face of the extraordinary circumstances caused by COVID-19?

c) Was the perspective adopted by the OECD adequate and sufficient?

d) Similarly, were the individual responses by States sufficient?

e) What conclusions can be withdrawn from the approaches taken, and how should the tax residence rules remain in a post-COVID-19 era?

Chapter II – The Establishment of Tax Residence

2.1. Brief Overview of ITL Rules

Tax law has evolved significantly over the past century, in response to innovations and changes in society, state powers, the impact of global events, and the growth of global trade. These developments made cross-border tax conflicts more evident and impossible to resolve them on a case-by-case basis, prompting states to modify and adapt their tax systems to this new reality. ITL emerged as a response to the fact that individuals and legal entities, the activities they engage in and the circumstances that define their legal realm, are no longer held confined to one jurisdiction, but are instead plurilocalized.[3],[4] Therefore, ITL generally refers to the "rules that deal with tax conflicts involving cross-border transactions".[5]

The first DTC between Prussia and Austro-Hungary, in 1899, market the beginning of efforts to resolve these emerging cross-border tax conflicts. This was followed efforts led by the League of Nations to develop an international double tax agreement that was acceptable globally, resulting in the MTCs of 1943 and 1946, although were not unanimously accepted.[6] Thus, the process of developing an internationally acceptable MTC was later on taken over by the OECD and, a few years later, followed by the UN.

The two influential MTCs are the UN[7] and OECD MTCs, that serve as standard conventions for the DTC to be celebrated between the various countries.[8],[9] The OECD's

3 PIRES, Rita Calçada, "Manual de Direito Internacional Fiscal", *in* Almedina, 2018, p. 15.

4 The term "plurilocalization" refers to the existence of elements that relate to two or more jurisdictions. Due to this "dual connection" ITL functions and attempts to determine who is entitled to taxing rights, who is not, and what will be taxed. *Ibidem.*

5 ROHATGI, Roy, "Basic International Taxation", *in* Kluwer Law International, 2002, p. 12.

6 *Idem*, p. 43.

7 The UN model is commonly used in DTC where at least one of the parties is a developing state and, usually awards greater taxing rights to the source state. OATS, Lynne, MILLER, Angharad, MULLIGAN, Emer, "The principles of International Taxation", *in* Bloomsbury, 6th Edition, 2017, p. 143-145.

8 It is important to underline that the MTCs should not be confused with the bilateral and multilateral DTCs celebrated between the states; the MTCs only outline standard rules that the states should follow in their respective agreements, in which they have the possibility to adapt and interpret the provisions stated in the MTCs.

9 There is still another MTC for the US.

project to develop a MTC was first launched in 1963, with the first complete version in 1977.[10] Since then the model has undergone profound changes.[11] According to the OECD's Report on the Base Erosion and Profit Shifting (hereinafter, BEPS) project, MTCs were first created with the intention of eliminating double taxation to promote global trade.[12]

However, the establishment of a definition of double taxation within ITL was a problematic issue. And as such, several scholars took alternative perspectives.[13] One of great interest is the one assumed by DORN, for which juridical double taxation requires the identity of the object of taxation in its material and objective elements, which then gives rise to tax obligations in multiple states for the same or similar items of income and for the same event or period.[14] Thus, juridical double taxation implies the fulfilment of two requirements, object identity[15] and multiple tax laws. It arises when the same fact or object fulfils the provision of two different tax laws, originating multiple tax claims.

10 VOGEL, Klaus, REIMER, Ekkehart, RUST, Alexander, "Klaus Vogel on Double Taxation Conventions", p.37 – 38.

11 The most important changes in the OECD MTC derive from BEPS, that is a 15-action plan to address "tax avoidance, improve the coherence of international tax rules, ensure a more transparent tax environment and address the tax challenges arising from the digitalization of the economy". Over 135 states have committed and adopted this 15-action plan to close gaps and mismatches in tax rules used by multinational enterprises (hereinafter, "MNE") to avoid paying taxes. This project has led to a vast production of relevant documentation in the field of international taxation and several rules were presented on the introduction of new domestic rules, and on the provisions included in the 2017 OECD MTC, and on the drafting of the interpretation guidelines. OECD, available at https://www.oecd.org/tax/beps/

12 Action Plan on Base Erosion and Profit Shifting, OECD Report 2013, Chapter 2, p. 9. Available at https://www.oecd.org/ctp/BEPSActionPlan.pdf

13 PIRES, Manuel, "Da dupla tributação jurídica internacional sobre o rendimento", *in* Centro de Estudos Fiscais da Direção Geral das Contribuições e Impostos, 1984, p. 29-37.

14 Herbert Dorn, p. 190 *apud* PIRES, Manuel, "Da dupla tributação jurídica internacional sobre o rendimento", p. 36.

15 This implies identity of taxpayers, tax period, tax levied, and identity of the object of taxation. MANUEL PIRES, rejects the idea above-mentioned and states that for double taxation to exist only object identity and a plurality of tax laws applicable is needed, rejecting the requirements of the identity of the tax levied and the period of taxation. PEREIRA, Paula Rosado, "Princípios do Direito Fiscal Internacional: do paradigma clássico ao direito fiscal europeu", *in* Almedina, 2010, p.22-23.

When the tax laws in cause are from multiple tax jurisdictions it is said to be international double taxation.[16]

In this regard, the OECD MTC aims at preventing and eliminating international juridical double taxation[17], with a system of shared taxing rights between the contracting states, namely between the residence and the source state. The classification and assignment rules of the MTC, commonly referred to as distributive rules, classify revenue items according to their source and nature before distributing the taxing rights between the contracting states. The convention establishes three options, full taxing rights, limited or shared taxing rights, and no taxing rights for one of the contracting states.[18] Under these rules, if the source state is granted full or limited taxing rights, the state of residence must allow relief to avoid double taxation.[19]

The main cause of juridical international double taxation is source-residence claims, as most states tax both the income originated in their territory and the income obtained in foreign sources by their residents. Therefore, international juridical double taxation usually arises due to the states claiming taxing rights according to the source principle and to the residence principle.[20]

The primary aim of the DTCs is to establish limits in which the contracting states can apply their domestic tax laws in a way to avoid double taxation, by creating a delimitation of the states' taxing rights. The MTCs purpose is the adoption of uniform taxing criteria rather than the harmonization of taxes, preventing and avoiding in this way double taxation. Nonetheless, they have other intended objectives such as to protect taxpayers, attract foreign investment to developing countries, to facilitate the expansion

16 *Ibidem.*

17 The OECD MTC and the DTCs celebrated to eliminate and prevent double taxation refer to juridical double taxation, instead of economic double taxation, which occurs when the same source of income is taxed in the hands of different taxpayers; juridical double taxation, on the other hand results from the taxation of the same person with respect to the same item of income and for identical periods in two or more states. LANG, Michael, "Introduction to the Law of Double Taxation Conventions", *in* Linde International, 3rd Edition, March 2021, p.1-4.

18 ROHATGI, Roy, "Basic International Taxation", p. 45-46.

19 This is the purpose of Articles 23A and 23B of the OECD MTC – the convention leaves it to the contracting states to choose between two methods of relied, the exemption method or the credit method.

20 But it can also result from residence-residence claims, when both states claim taxation of an individual as a resident; or from source-source claims, when two or more states claim taxing rights on the same transaction. *Ibidem.*

of legal entities to developed countries, to fight against tax fraud and evasion, avoid discrimination, and many others.[21]

Furthermore, it is important to keep in mind that the goals supported by ITL are those of domestic tax systems, namely the promotion of fairness by imposing equal tax burdens, to obtain a fair share of tax revenues from cross-border transactions, and to establish a fair balance between capital export and capital import neutrality.[22],[23] Thus, usually the principles of tax sovereignty, equality and neutrality are appointed as the structural principles of ITL.[24] On the other hand, the principles of source and residence, PE, territoriality, arm's length, and non-discrimination are choose as the guiding principles for the allocation of taxing rights amongst the states.[25]

Since the creation of the MTCs the number of DTCs to prevent and eliminate double taxation has increased dramatically. This significant rise is due to increasing mobility of people, resources, and services, as well as the rise in individuals living outside of their state of nationality. The success and influence of the MTCs is, therefore, clear, and as a result, it made it easier for DTCs to continue being adopted and to properly manage and resolve cross-border tax disputes and the problem of juridical double taxation.

However, when there was a closed economy, tax disputes where limited to the borders of the states in which they occurred. This was supported by the territoriality principle that regulated exclusively the tax relations on a global scale. This principle implies that a state has the right to tax every person, legal entity, and transaction involving its territory, regardless of being the state of residence or nationality of the taxpayer in

21 PIRES, Manuel, "Da dupla tributação jurídica internacional sobre o rendimento", p. 419-424.

22 ROHATGI, Roy, "Basic International Taxation", p. 1.

23 Tax systems are said to be neutral when they have no influence on taxpayers' economic choices regarding cross-border transactions, and they may also be neutral with regard to capital import or export. Capital export neutrality is the "term used by economists to describe the situation where taxation is neutral towards the export of capital because investors in the capital exporting country are subject to the marginal effective tax rate on income from similar investments, whether undertaken domestically or abroad. In other words, tax considerations will not play a decisive role in a domestic investment decision to invest in another country". Capital import neutrality is the "term used to describe the situation where taxation is neutral towards the import of capital because domestic and foreign suppliers of capital to any national market obtain the same after-tax return on similar investments in that market". *Idem*, p. 580-581.

24 PEREIRA, Paula Rosado, "Princípios do Direito Fiscal Internacional: do paradigma clássico ao direito fiscal europeu", p. 50-51.

25 *Idem*, p. 52-53.

cause. These days, the practice of ITL takes place in a highly technological, globalized, open, and interdependent environment. In this sense, the economy must coexist with the states' sovereignty, by giving governments the ability to levy taxes, however it is not unlimited. Nowadays, with the continuous celebration of DTCs there is a "fragmentation of the states' tax sovereignty"[26], since it is extrinsically limited by the adoption these agreements and by European Union (hereinafter, EU) Tax Law.

Hence, tax laws are not in principle international, they are creations of sovereign states. Thereby, the most obvious aspect of the states' ITL is represented by its tax treaties, and nowadays, domestic tax systems cannot be comprehended in a separate manner.[27]

2.2. EU and ITL Tax Residence Framework

Under this section we plan to provide an overview of the tax residence rules in ITL and in the EU tax law, and its importance in such contexts. The definition of the states' taxation rights was an early focus in the ITL framework and remains a topic of debate in academic and jurisprudential communities today. Nowadays, residence plays a key role in determining what, and in what measure a given taxpayer will be subject to a state's tax sovereignty.

Before the first world war, not many states taxed nonresidents on income generated therein, since taxation was mainly based on the nationality nexus. However, today

26 PIRES, Rita Calçada, "Manual de Direito Internacional Fiscal", p. 19 -22.

27 ARNOLD, Brian J., "International Tax Primer", 3rd Edition, Kluwer Law International BV, 2019, p. 3.

taxation based on nationality no longer has the support of ITL[28] or of domestic tax systems.[29],[30] Thus, there was a redefinition of the nationality jurisdiction as residence.

Nonetheless, a few considerations regarding nationality should be retained, namely that nationality corresponds to a strong legal and political connection to a state, which attributes the nationality status, even if the taxpayer lives abroad, and encompasses a collection of rights and obligations. As a result of socioeconomic and political changes, the source and residence principles have taken the place of the nationality nexus as a relevant connecting element for the distribution of taxation rights.

Nowadays, most tax systems are based on the territoriality principle, meaning that they can levy taxes independently of the residency of their taxpayers. Some authors argue that there is in fact a common understanding in international taxation that a state's tax law is applicable in its territory to all the tax relevant circumstances that happen in that state, independently of the nationality, domicile, or residence of the taxpayer. The territoriality concept, however, needs to be interpreted more broadly nowadays as it can no longer be based solely on tangible factors like the location of specific assets and the site of an activity.[31]

In this sense, most jurisdictions have adopted the residence nexus as the principal criterion for their tax claims. Taxation based on the residence is the primary rule for taxing

28 "Whereas most conventions concluded in the first part of the 20th century were applicable to nationals or citizens of the contracting states, conventions concluded afterwards almost always apply to residents of one or of both contracting states irrespectively of nationality." This approach is reflected in Article 1(1) of the OECD MTC. In fact, the Convention only gives relevance to nationality as a tiebreaker rule in Article 4, and also on Article 24 regarding the prohibition of tax discrimination which is based on nationality. Paragraph 1of the Commentary on Article 1 of the OECD MTC; VOGEL, Klaus, REIMER, Ekkehart, RUST, Alexander, "Klaus Vogel on Double Taxation Conventions", p.224-279.

29 Rare are the states that have tax systems that are based on the taxation of their nationals, such as the United States (hereinafter, "US") that taxes their citizens on their worldwide income. Typically, citizenship and nationality are equated. No matter where they reside, the US insists on having the right to tax its citizens' worldwide income, because it offers its citizens advantages even if they reside abroad. ISENBERGH, Joseph, "International Taxation: U.S. Taxation of Foreign Persons and Foreign Income, *in* Wolters Kluwer, 6th Edition, Volume 1, 2022, p.21.

30 Additionally, the East African country of Eritrea also exercises a nationality-based taxation and as such taxes its citizens living abroad. This is known as the "diaspora tax" and has been condemned by the international community.

31 BREU, José Carlos, "Fiscalidade Internacional: abordagem prática no âmbito dos impostos sobre o rendimento", p. 17-26.

income and capital at national and international level, such that DTCs are based fundamentally on the distinction between residence and source state. In contrast with residence state taxation, source state taxation is the taxing right that is granted to the state where the income was generated or where the assets are located, there is no relationship between the taxation and the taxpayer, it is regardless of his residence or nationality.[32]

However, it is important to note that DTCs do not impose taxes on the contracting states but are instead of a relieving character. Therefore, the significance of tax residence in these agreements resides in the underlying dimensions of its' applicability: the taxation of resident taxpayers on their worldwide income (residence state taxation) and the taxation of nonresident taxpayers on their foreign generated income (source state taxation).[33]

Tax residency is, thus, one of the cornerstones of international taxation, and more specifically of ITL. The importance of this concept is clear, especially in the context of income taxation. Hence, if a taxpayer is given the status of tax resident, they will be subject to full tax liability under the universality principle[34], which means they will be expected to pay income tax on the basis of their worldwide income, considering both domestic and foreign sources, manifesting in a true system of unlimited taxation. This means that tax residence shows up as a close personal and economic connection to a given state, which implies a permanent or temporary physical presence, housing availability, or the existence of a certain type of economic connection, such as the exercise of an economic activity.[35] As a result, tax residency is typically linked to a full tax liability system, demonstrating a solid and long-term relationship with a state's territory. However,

32 PIRES, Rita Calçada, "Manual de Direito Internacional Fiscal", p. 53.

33 LANG, Michael, "Introduction to the Law of Double Taxation Conventions", p. 1-4.

34 The universality principle is also typically referred to as worldwide taxation principle, or unlimited taxation principle. According to this concept, all residents of a state, including both individuals and legal entities, are theoretically subject to unlimited taxing rights of that state. This includes taxation on income from foreign sources. As a result, it is frequently described as an extension of the territoriality principle (extra-territoriality of a domestic tax law). PEREIRA, Paula Rosado, "Princípios do Direito Fiscal Internacional: do paradigma clássico ao direito fiscal europeu", p. 89.

35 PIRES, Manuel, "Da dupla tributação jurídica internacional sobre o rendimento", p. 220.

if this relationship is tenuous or consists primarily in objective factors[36], only the income earned in that given state is in principle taxed (principle of territoriality), this system is typically referred to as limited tax liability. In this sense, it is frequently said that most countries tax residents on their worldwide income and nonresidents on the income generated therein.

In what regards the OECD MTC personal scope it is laid down on the concept of tax residence, which means the convention is applicable to persons who are residents of one or both contracting states, as defined by their domestic laws.[37] The MTC does not attend to other personal nexus such as nationality or the status of taxpayer to fulfil its personal scope of application. Tax residents are therefore the convention's personal scope of application, but the MTCs also provides an objective, geographical, and temporal scopes of application. No matter how they are administered, income and capital taxes at the local, federal, and state levels are included in the material scope.[38] However, because it involves a ratified treaty, the temporal scope is often indefinite but may be renegotiated or terminated as needed.[39] And in what regards the territorial scope it refers to the precise geographic region or tax jurisdictions encompassed by the DTC.[40]

In conclusion, tax residence of individuals typically implies taxation on their worldwide income and capital. The two most used factors to establish an individual's tax residence are the physical presence test and the analysis of their social and economic

36 In this sense, there are personal connections to a state which are described by LANG as the domicile, residence or nationality regarding individuals, and place of effective management or place of incorporation for legal entities, as opposed to objective factors which are transactions or activities that connect a taxpayer to a given state. LANG, Michael, "Introduction to the Law of Double Taxation Conventions", p. 1-4.

37 Article 1 of the OECD MTC.

38 The objective scope of application is established in Article 2(2) of the OECD MTC. It also contemplates an exemplifying clause in paragraph 3 and an amplifying clause in paragraph 4, extending its applicability to all identical or substantially similar taxes imposed after the convention's signature.

39 Article 31 of the OECD MTC, which states that DTC become effective upon ratification and the states shall agree to exchange documents of ratification as quickly as feasible, may also be used to specify the temporal scope of applicability for each DTC celebrated. Additionally, in accordance with Article 32, their relationship will continue indefinitely, albeit it may be dissolved at any time. According to this Article, a contracting state may unilaterally terminate a DTC by providing notice of termination at least six months before the start of the following calendar year. However, it is terminable with the consent of both contracting parties. ARNOLD, Brian J., "International Tax Primer", p. 153.

40 It is also important to underline Article 30 of the OECD MTC regarding territorial extension.

circumstances. However, domicile may also be significant.[41] In what concerns legal entities tax residence the two basic approaches are the place of incorporation or registry or the economic or commercial connection of a company to a given state.

2.2.1. EU Tax Law

When considering the tax laws of the EU, it is important to bear in mind its primary objective of establishing and maintaining a single market. The EU's goal in the single market is to implement cohesive and common policies that foster and enhance economic activity in its community.[42] As a consequence, the tax laws of the EU emerge from the development of its single market, looking to regulate this space.

This approach stands in contrast to the objectives and provisions found in DTCs. Since unlike these DTCs, the EU's single market strategy strives to formulate multilateral accepted definitions for essential tax aspects, always in alignment with the fundamental principles and freedoms of the EU.

Consequently, the diverse tax systems employed by individual member states (hereinafter, MS) maintain their distinctiveness. This is achieved through their domestic legislations or through the celebration of DTCs. Within these the MS retain their sovereignty and are therefore not required to adapt their own tax systems to those of the other MS or to do so to prevent double taxation brought on by the parallel exercise of their taxing rights.[43] In summary, MS maintain their tax sovereignty in what concerns direct taxes, but they must do it in a manner that is compliant with EU legislation.[44]

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41 OATS, Lynne, MILLER, Angharad, MULLIGAN, Emer, "The principles of International Taxation", p. 48.

42 Articles 2 and 3 of the Treaty of the European Union (hereinafter, "TEU").

43 DOURADO, Ana Paula, "Lições de Direito Fiscal Europeu: Tributação Direta", in Wolters Kluwer Portugal, 2010, p. 78-93 and 139-144.

44 This understanding arises from various case law of the CJEU, namely paragraph 26 of the Case *Avoir Fiscal,* C-270/83, of 28th of January of 1986: "Moreover, the rights conferred by Article 52 of the Treaty are unconditional and a Member State cannot make respect for them subject to the contents of an agreement concluded with another Member State. In particular, that Article does not permit those rights to be made subject to a condition of reciprocity imposed for the purpose of obtaining corresponding advantages in other Member States"; Case Biehl, C-175/88, paragraph 12; Case Schumacker, C-297/83, paragraph 21; Case Asscher, C-107/94, paragraph 36. PEREIRA, Paula Rosado, "Princípios do Direito Fiscal Internacional: do paradigma clássico ao direito fiscal europeu", p. 245.

In what regards the concept of tax residency within the EU, it's important to emphasize that both Article 18 of the Treaty on the Functioning of the European Union (hereinafter, TFEU) and the provisions outlining its fundamental freedoms are primarily rooted in nationality.[45] Consequently, potential tax implications may arise due to the fact that these common standards might not have been originally designed to address tax-related concerns.

The conventional differentiation between residents and nonresidents for tax purposes gives rise to additional complexities. Notably, ITL designs a distinct framework for nonresidents, where it does not consider whether it is aligned with the circumstances of the taxpayer. Conversely, such considerations are consistently required within EU tax law to ascertain the presence of any potential discriminatory practices or constraints concerning fundamental freedoms.[46]

In this context, and when examining the establishment of tax residence within the framework of EU, it becomes evident that the definition of a tax resident is centered around establishing whether specific taxpayers meet the residency criteria, thereby benefit of a particular directive. The provisions of the directives mentioned below outline the requirements for the verification of certain tax circumstances as defined by domestic laws of MS. In a similar manner to DTCs[47], the concept is established based on domestic laws of individual MS.

Under this chapter, we will exemplify the above statement, by analyzing the tax resident definitions presented in several EU directives. Regarding the directive on a common system of taxation applicable to interest and royalty payments made between associated companies of different MS[48] the definition is set forward on Article 3. This definition encompasses a reference to the domestic laws of the MS, with an exception made for those who are considered residents according to a DTC concluded with a third

45 The fundamental freedoms are stated in Articles 45, 49, 56 and 63 of the TFEU, and are respectively the free movement of workers, freedom of establishment, freedom to provide services and free movement of capital. The freedoms are directly applicable in MS and confer rights to individuals and companies.

46 DOURADO, Ana Paula, "Lições de Direito Fiscal Europeu: Tributação Direta", p. 78-93 and 139-144.

47 Regarding international taxation, the concept of resident is present in the Article 4 of the OECD MTC and stipulates that this concept is to be defined according to the contracting states' national legislation.

48 Article 3 of the Council Directive 2003/49/EC, of 3 June 2003. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003L0049&from=EN#d1e147-49-1

state, outside of the EU. This definition is also mirrored in the directive on the common system of taxation applicable in the case of parent companies and subsidiaries of different MS.[49] Additionally, the directive on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different MS[50] shares the same definition.

As a result, it becomes apparent that the question of whether an autonomous definition of tax residence exists in the realm of international taxation or within the framework of EU tax law — or if this idea is just applicable to national tax law systems — has been addressed. It could be inferred that the definition of resident is inherently linked and reliant upon national tax systems, whether in the context of EU tax law (through directives), or in ITL (through the OECD MTC).

Nevertheless, the aforementioned conclusion presents an inherent issue, the absence of uniform and harmonized definitions of tax residence, which potentially leads to situations where a taxpayer might be deemed resident in multiple jurisdictions due to different criteria.[51] Furthermore, in this respect it is important to highlight that there is little tax harmonization in terms of direct taxation, as opposed to what is seen in the indirect taxation realm. In this pursuit, the EU, primarily through its institutions and the enactment of legally binding normative instruments such as directives, aims of bringing closer the various tax systems. The CJEU harmonizes the distinctions between national

49 Article 2 of the Council Directive 90/435/EEC, of 23 July 1990. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31990L0435&from=EN

50 Article 3 of the Council Directive 2009/133/EC, of 19 October 2009. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32009L0133&from=GA#d1e189-34-1

51 This is also supported by Court of Justice of the EU (hereinafter, “CJEU”) approach to direct taxation via its case decisions, creating a negative fiscal harmonization in these matters. The CJEU, through its case law, often intervenes in national tax matters to ensure that MS' domestic laws are not discriminatory or restrictive to the freedoms enshrined in the Treaties. This process, termed as "negative harmonization", does not involve the creation of new EU-wide tax laws but rather the elimination or modification of national laws or rules that are seen as barriers to the EU's single market. While the CJEU doesn't dictate specific tax policies or definitions, its interventions often indirectly shape national tax landscapes. Notably, the CJEU has issued numerous rulings on tax matters, indirectly impacting on national tax systems. Some landmark cases which demonstrate the CJEU's role in shaping tax matters, include the Cadbury Schweppes (Case C-196/04); the Marks & Spencer (Case C-446/03); and the *Saint-Gobain* (Case C-307/97). DOURADO, Ana Paula, “Lições de Direito Fiscal Europeu: Tributação Direta”, p. 27; PEREIRA, Paula Rosado, “Princípios do Direito Fiscal Internacional: do paradigma clássico ao direito fiscal europeu”, p.295.

tax laws, EU tax laws, and ITL rules, holding a notable significance in this regard. Given the absence of explicit provisions in EU tax law pertaining to direct taxation, beyond EU secondary laws like the aforementioned directives, this court's contribution to establishing the relationship between ITL, DTCs, and EU tax law has been instrumental.[52] This is because, in addition to EU law, there is a network of more than 300 DTCs inside the EU, and commonly in tax matters, EU legislation takes the form of directives and decisions.[53]

In fact, the CJEU has already examined the complex topic of the DTC celebrated by MS and their interaction with EU law. And in this sense, it is important to analyze a few of the CJEU's earlier decisions to better comprehend the connection between EU law and DTCs. Notably, the Case *Avoir Fiscal* marked the first instance of this problematic as an accidental question. This case established that MS cannot adopt in their domestic legislation or in DTCs measures or rules that are incompatible with EU principles and legislations. Similarly, in cases, such as the *Saint-Gobain* case[54], the Court addressed the same problematic.[55] In essence, the conclusion drawn is that incompatibilities between DTCs' provisions and EU law are sanctioned as MS are required by EU legislation to avoid adopting DTCs' provisions that are in conflict with EU law, and in such situations, EU law takes precedence over DTCs provisions.[56]

52 PEREIRA, Paula Rosado, "Princípios do Direito Fiscal Internacional: do paradigma clássico ao direito fiscal europeu", p. 303.

53 OATS, Lynne, MILLER, Angharad, MULLIGAN, Emer, "The principles of International Taxation", p. 147-148.

54 C-307/97, of 21 of September of 1999 – The CJEU ruled that Germany's tax rules, which denied deductions to an affiliate of a French enterprise due to its management location and non-resident firm status, violated the EU's freedom of establishment. Such rules favored resident businesses over nonresidents, limiting the latter's choices in legal structures. The CJEU emphasized that while EU MS can determine tax distribution factors, they can't override taxpayer rights under the TFEU. If there's a conflict between EU law and a DTC, EU law prevails. DOURADO, Ana Paula, "Lições de Direito Fiscal Europeu: Tributação Direta", p. 78-93 and 139-144. OATS, Lynne, MILLER, Angharad, MULLIGAN, Emer, "The principles of International Taxation", p. 147-148.

55 Other examples of case law where the relationship between EU law and DTCs on direct taxation issues was discussed are the case *Bachmann*, C-204/90; the case *Werner*, C-112/91; and the case *Gilly*, C-336/96. These established that EU MS have the freedom to create and implement their own regulations on direct taxes. DOURADO, Ana Paula, "Lições de Direito Fiscal Europeu: Tributação Direta", p. 78-93 and 139-144.

56 This obligation is stated in Article 4 (3) of the TEU.

In summary, MS are obliged to implement the directives' provisions into their national laws and to abide by the CJEU's rulings.[57] However, it is not unexpected that there is a lack of coordination between EU law and DTCs inside the EU given their distinct goals of establishing and regulating the EU single market and allocating taxation rights among contracting nations, respectively.[58]

2.2.1. Tax Residence in Domestic Law – Selected Countries

In order to better comprehend the issues raised in this chapter and those that follow, we will examine the notion of resident in various states as an example after asserting that it differs significantly from state to state and that poses challenges and difficulties in terms of practical applicability.

A person is a tax resident of *France* if their tax domicile is there. Individuals are considered to have a domicile therein if France is where their home is, if it is where they conduct business, excluding activities that are incidental to those conducted abroad, if it is the center of their economic interests, or if it is their main place of abode.[59] In what regards legal entities, they are considered tax residents if the entity operates in France, meaning they carry activities on a regular basis, through an autonomous establishment or through representatives, or as part of operations forming a complete businesses cycle. Therefore, a PE in France is always considered a tax resident.[60]

If a person has their domicile or usual place of abode in *Germany*, they are regarded as tax residents.[61] The term "domicile" refers to a location, a home, or a habitation where a residence is kept constantly. Habitual abode is often assumed when there is a physical continuous stay longer than six months in a calendar year or over a period of two years. In what regards legal entities tax residence, if they have a registered office or place of management in Germany, they are considered tax residents.[62]

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57 This reflects the principle of primacy of EU law, which is one of its core principles.

58 OATS, Lynne, MILLER, Angharad, MULLIGAN, Emer, “The principles of International Taxation”, p. 147.

59 Article 4A and 4B of the French General Tax Code. Available at https://www.legifrance.gouv.fr/codes/Article_lc/LEGIARTI000006302200

60 *Idem*, Article 209 (1).

61 Section 8 and 9 of the German Fiscal Code (Abgabenordnung). Available at https://www.gesetze-im-internet.de/englisch_ao/englisch_ao.html#p0084

62 *Idem*, section 10 and 11.

In *Portugal*, the tax residence is tied with the physical presence test for over 183 days, nonetheless it adopts other criteria such as housing availability with intention of occupying it as his permanent home.[63] For legal entities if they have their place of effective management or headquarters in Portugal, they will be considered tax residents.[64]

In *Spain* a resident is defined as per "habitual residence". This concept is based on the physical presence test, and it requires physical presence of the taxpayer in that state for over 183 days, or in contrary residence is established if the taxpayer has its primary place of business or other economic interesse set therein. Additionally, an individual can be presumed a tax resident if his family lives in Spain, and the tax residence is determined for a full-year and cannot be changed during the course of that same year.[65] In what concerns legal entities, they will be considered residents if they were constituted according to Spanish law, if their registered office is in Spain or its effective headquarters are based there.[66]

All individuals who establish a home in *Denmark* are considered to be residents, however if they have not established a home, individuals are also deemed to be residents based on staying at least six months there.[67] In what concerns legal entities, they will be considered residents if registration or place of effective management is in Denmark.[68]

In *Sweden*, an individual who stays therein for six months or more, continuously, or that have previously been a resident of this jurisdiction, and as such still have close ties to, are considered tax residents and liable for tax on their worldwide income.[69] In what

63 Article 16 (1) of the Portuguese Income Tax Code. Available at http://bdjur.almedina.net/citem.php?field=item_id&value=489075

64 Article 2 (3) of the Portuguese Corporate Tax Code. Available at https://info.portaldasfinancas.gov.pt/pt/informacao_fiscal/codigos_tributarios/CIRC_2R/Pages/irc2.aspx

65 Articles 9 and 10 of the Law 35/2006, of 28 of November on the Individuals Income Tax and partial amendment of the Laws regulating Corporation Tax, Non-Resident's income tax and Wealth Tax. Available at https://www.boe.es/buscar/act.php?id=BOE-A-2006-20764

66 Article 8 of the Law 27/2014, of 27 November on Corporate Income Tax. Available at https://www.boe.es/buscar/act.php?id=BOE-A-2014-12328

67 Section 1 (1), paragraphs 1-4 of the Taxation at Source Act (*Kildeskatteloven*). Available at https://www.retsinformation.dk/eli/lta/2016/117.

68 ROHATGI, Roy, "Basic International Taxation", p. 148.

69 Chapter 3 of the Swedish Income Tax Act *(Inkomstskattelag* 1999:1229). Available at https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/inkomstskattelag-19991229_sfs-1999-1229/#K3

legal entities, Sweden considers to be residents companies that are registered therein, and also entities that are not required to be registered but have their management in this jurisdiction.[70]

In *Australia* an individual is determined to be a tax resident based on common law and statutory tests. An individual who resides therein will be considered a tax resident, however the concept of residency will also consider the individuals' circumstances, namely the intent or purpose of the presence, family or business and employment ties, maintenance, and location of assets, and social and living arrangements. If an individual does not satisfy the common law test of residence he can still be considered a resident if he satisfies one or more statutory residence tests, namely the domicile is in Australia, the individual spent more than half the financial year therein, or the person is a contributing member of a superannuation fund for commonwealth government officers, and there is no permanent place of abode outside and/or they do not intend to take up residence in Australia. In what regards legal entities, Australia applies the incorporation test, and the central management or voting power controlled by shareholders who are residents of Australia criteria in case a legal entity is not incorporated in Australia.[71]

In *Canada* tax residence is determined on a case-by-case basis, and individuals can be ordinarily residents or deemed residents. An individual is usually considered an ordinarily resident if he has residential ties, such as a home, social and economic interests, and other connections therein. However, there are also deeming resident provisions, such as spending 183 days or more in Canada that apply when there are no connections

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70 *Idem*, chapter 4-7.

71 Subsection 6(1) of the Income Tax Assessment Act 1936. Available at http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/itaa1936240/s6.html ATO Taxation Ruling 98/17. Available at https://www.ato.gov.au/law/view/pdf/pbr/tr1998-017.pdf

therein.[72] In what regards legal entities, they are considered residents based on central management and control is test, and place of incorporation.[73]

In *Ireland* an individual must spend over 183 days in in a calendar year or 280 days in Ireland over the course of two years to be designated a tax resident in that country.[74] For legal entities, the criteria adopted for the establishment of tax resident is being centrally managed and controlled in Ireland, nonetheless due to abuse situations where companies were deemed "stateless", it amended its provision to the place of incorporation, if the company is not considered resident elsewhere.[75]

In the *US* the term "United States Person" is used in conjunction with nationality rather than the idea of residency. Thus, regardless of the length of any departure from the US, US citizens and "resident aliens"[76] are subject to tax on their worldwide income. Additionally, an individual can be considered a tax resident based on the days of presence, by being physically present in the 31 days during the current year, and 183 days during

72 Income Tax Folio S5-F1-C1, Determining an Individual's Residence Status. Available at https://www.canada.ca/en/revenue-agency/services/tax/technical-information/income-tax/income-tax-folios-index/series-5-international-residency/folio-1-residency/income-tax-folio-s5-f1-c1-determining-individual-s-residence-status.html Government of Canada, Determining your residency status. Available at https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/information-been-moved/determining-your-residency-status.html

73 Subsection 250(4) of the Income Tax Act. Available at https://laws-lois.justice.gc.ca/Search/Search.aspx?txtS3archA11=250&txtT1tl3=%22Income+Tax+Act%22&h1ts0n1y=0&ddC0nt3ntTyp3=Acts Government of Canada, Residency of a corporation. Available at https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/businesses-international-non-resident-taxes/residency-a-corporation.html#deem

74 Section 819 (1) of the Taxes Consolidation Act 1997, Part 34 Provisions relating to the residence of individuals. Available at https://www.irishstatutebook.ie/eli/1997/act/39/section/819/enacted/en/html

75 Section 23A of the Finance Act 2014, Chapter 5 Corporation Tax. Available at https://www.irishstatutebook.ie/eli/2014/act/37/section/43/enacted/en/html#sec43 OATS, Lynne, MILLER, Angharad, MULLIGAN, Emer, "The principles of International Taxation", p. 87.

76 "Individual tax residents to the US include citizens and resident aliens. A resident alien satisfies either the green test card or the substantial presence test for the calendar year. (…) An individual is resident for tax purposes if he/she is a lawful permanent resident of the US at any time during the calendar year. Lawful permanent residency is awarded to individuals given the privilege, according to the immigration laws, of residing permanently in the US as an immigrant." OATS, Lynne, MILLER, Angharad, MULLIGAN, Emer, "The principles of International Taxation", p. 52-53. IRS, Determining na Individual's Tax Residency Status. Available at https://www.irs.gov/individuals/international-taxpayers/determining-an-individuals-tax-residency-status

the 3-year period that includes the current year and the 2 years immediately before that.[77]The US has a strictly formal approach when it comes to legal entities, and all businesses set up in accordance with US law are considered as residents.[78]

In the *United Kingdom* (hereinafter, UK) a statutory residence test applies, and it considers an individual to be a tax resident based on facts such as the time spent in the country (183 days physical presence test), whether they have only one home and it is located in the UK and work full time and connection to the UK. Other criteria include regular travels to this state and spending at least an average of 91 days in the state for a course of four years. In the fifth year the individual will be considered a resident taxpayer.[79] In what regards legal entities they will be considered tax residents if they are incorporated or managed and controlled in the UK.[80]

While there are many similarities among nations—for example, many countries consider someone to be a tax resident if they are physically present therein for more than 183 days or if they have strong economic and social ties—the various definitions of tax residence can result in a person potentially being considered a tax resident in more than one nation at the same time.

Table 1: Comparative Table

77 IRS, Substantial Presence Test. Available at https://www.irs.gov/individuals/international-taxpayers/substantial-presence-test

78 OATS, Lynne, MILLER, Angharad, MULLIGAN, Emer, "The principles of International Taxation", p.86.

79 Schedule 45 of the Finance Act 2013. Available at https://www.legislation.gov.uk/ukpga/2013/29/schedule/45

80 HMRC internal manual, International Manual, ITH300 Company residence. Available at https://www.gov.uk/hmrc-internal-manuals/international-manual/intm120210#IDAPP1SG

Issue	France	Germany	Portugal	Spain	Denmark	Sweden	Australia	Canada	Ireland	US	UK
183 days physical presence test?	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Intention/purpose of the stay considered?	No	No	Yes	No	No	No	Yes	No	Yes	No	No
Residence based in domicilie?	Yes	Yes	No	No	No	No	Yes	Yes	No	No	No
House/home availability?	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	No	No	Yes
Business or economic interests considered?	Yes	No	No	Yes	No	Yes	Yes	Yes	No	No	No
Place of abode consired?	Yes	Yes	No	No	No	Yes	Yes	No	No	No	No
Family/social ties considered?	No	No	No	Yes	No	Yes	Yes	Yes	No	No	No

Issue	France	Germany	Portugal	Spain	Denmark	Sweden	Australia	Canada	Ireland	US	UK
Place of incorporation/ registered office?	No.	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Central management and control test applied?	No.	Yes	Yes	No	Yes	Yes	Yes	Yes	No	No	Yes

2.3. Conceptual Distinction: Tax Residence and Tax Domicile

Tax residence and domicile while sometimes aligned, they are two separate notions. Tax residence, being a component of ITL, affects the existence and extension of taxing rights, whereas tax domicile typically affects tax competence in terms of territory, including local governments and TAs.[81]

The concept of "domicile" originates from English common law, where each individual is required to have a single domicile, and it is typically referred to as his permanent residence in civil law countries, or the location to which he always plans to return.[82]

Fiscal or tax domicile[83] is a legal notion used by many countries to determine an individual's permanent connection to a state, which can be their place of birth or where their family resides.[84] This is a concept distinction under common law between “domicile of choice” and “domicile of origin”, explaining how the domicile was obtained without altering the term's meaning. The latter is a domicile acquired at birth through parental circumstances, serving as a residual domicile when no other domicile is established.[85] In contrast, domicile of choice is consciously acquired.[86]

Various countries employ different methods to establish domicile. The definitions are crucial for tax reasons since, in many jurisdictions, residents are liable to a higher tax liability than non-domiciled individuals. As a result, domicile is a notion that refers to which country's jurisdiction an individual is subject to and is not just related to taxation.
However, the idea of domicile may also be applied when determining which state the taxpayer is affiliated to for taxation. In this sense, it is important to note that the presence of a socio-economic relationships between the taxpayer and the state in the tax residency criterion implies a physical presence, permanent or temporary, the availability of a home, or the existence of a certain type of economic connection such as the performance of an

81 In this sense another notion that is important to define is nonresidents which is usually determined *a contrario sensu* of the definition of resident, namely for not being physically present in a given state for more than 183 days.

82 ROHATGI, Roy, “Basic International Taxation”, p. 153 and 588-589.

83 In this sense, even domicile and residence are different concepts than tax domicile and tax residence.

84 ARNOLD, Brian J., “International Tax Primer”, p.19.

85 ROHATGI, Roy, “Basic International Taxation”, p.153 and 588-589.

86 *Ibidem.*

activity or function. And, thus, some authors, including MANUEL PIRES[87] refer that tax domicile (or habitual residence) is another reality that is included in the concept of tax residency. According to this author, residency, not domicile, is the idea used in DTCs; and as a result, two realities that were formerly denoted independently by two different terms are now merged.

In summary, while residence and domicile may sometimes overlap, they should not be conflated. Residence typically refers to where the person lives for a period, while domicile denotes their permanent dwelling. By equating criteria like domicile and residence, we contribute to the phenomenon of not considering the differences between nationality and residence as distinct subjective nexus, creating opportunities for states to use only nationality-related criteria like the place of incorporation or registration for legal entities.

Furthermore, it's important to recognize that the terms domicile and residency have distinct meanings in various legal disciplines like administrative law, labor law, or international private law. Different countries define and apply these terms uniquely for tax purposes.

2.4. Concept of Tax Residence Under Article 4 of MCOECD

Firstly, it is crucial to emphasize that the goal of this chapter is to evaluate the notion of tax residence as it is presented in the OECD MTC, not as it is presented in other international instruments.

Under Article 4(1) of the OECD MTC a resident of a country for purposes of the convention is a person who is liable to tax in that country "by reason of his domicile, residence, place of management or any other criterion of similar nature".[88] The individual must be geographically attached to the state as a resident and subject to full tax liability, excluding from this concept any person who is liable to tax only on income from sources in that state or capital therein.[89] This Article outlines the circumstances under which each

87 PIRES, Manuel, "Da dupla tributação jurídica internacional sobre o rendimento", p. 222.

88 Article 4(1) of the OECD MTC.

89 The second clause of Article 4(1) was initially intended to exclude foreign diplomats and consular agents who would be taxed on their domestic source income in accordance with Article 28 of the OECD MTC. However, it also serves to exclude an offshore company in a treaty haven since it would not be considered a resident if its foreign income and capital are exempt from tax. VOGEL, Klaus, REIMER, Ekkehart, RUST, Alexander, "Klaus Vogel on Double Taxation Conventions", p. 331-333.

state may define an individual or legal entity as a resident. In this sense, it is clear that taxation exists in these cases due to a personal connection rather than an objective connection. And residence functions in this Article as a general clause to distribute taxing rights, in accordance with each contracting states' definition of resident. It is crucial to remember that just because a person is regarded as a resident of a contracting state, it does not automatically entitle them to the convention's benefits. In fact, some or all of these benefits could be refused in accordance with the convention's provisions, namely Article 29.[90]

Residence normally denotes physical presence for a minimum number of days, with 183 days often being sufficient to subject a person to taxation on their worldwide income for the year. This criterion is usually referred to as the *corpus* of tax residence. Nonetheless, almost every state complements this test with other factors such as, the location of the main place of residence, family ties and intention of maintaining a habitual abode. This is usually referred to as the *animus* of tax residence.[91] As a result, most DTCs include these criteria, and they are stated in Article 4 of the OECD MTC.

One of the states must be chosen as the residence and the other as the source state for the DTC to function. However, it is quite conceivable for a taxpayer to be considered a tax resident in both states in accordance with their domestic legislation. Thus, the OECD decided to hierarchize the multiplicity of criteria that can be used to establish tax residence in a way that makes it possible to resolve situations of multiple residence by finding only one tax residence for a given taxpayer. Hence, the usefulness of Article 4 lies in the tiebreaker rules it establishes with an aim to prevent a taxpayer from being considered a dual resident.

2.4.1. Tax Residence of Individuals

Article 4(1) sets forward the subjective nexus of the OECD MTC, that is tax residence. There can be two types of residents: individual taxpayers and legal entities. As seen, the OECD MTC does not define "resident"; rather, it defers to the domestic laws of the contracting states. Accordingly, the states can decide whether a taxpayer must meet domicile, residence, place of effective management, nationality, or any other criteria to be considered a resident. The Convention does not specify the requirements that domestic

90 Paragraph 1of the Commentary on Article 1 of the OECD MTC.

91 PIRES, Manuel, “Da dupla tributação jurídica internacional sobre o rendimento”, p. 596.

tax laws must meet in order for a claim of full tax liability to be recognized between the contracting states.[92] Therefore, even though the hierarchized criteria of Article 4(2) are used secondarily, the authority is first and foremost that of the contracting states.[93] The only requirement for residence according to the OECD MTC is that the taxation of residents is made on their worldwide income according to a full tax liability scheme.

The remission made for domestic tax laws regarding the definition of resident is justified by the fact that DTCs do not establish taxes but are instead of a relieving nature and limit the states' taxing rights, but do not define what is taxed or not. Thus, according to Article 4 and its commentary, a resident is the individual or legal entity that at light of domestic tax laws is taxed on its worldwide income.

An ideal residence test is one that both taxpayers and taxing authorities can use to arrive at a definite, transparent, and equitable conclusion, since the tax implications for taxing residents and nonresidents are extremely different. And as a result, in many states, decisions rely on a "facts-and-circumstances test". This test frequently determines where people reside and considers a number of different factors such as the person's center of vital interests, family ties, the capacity to maintain a home, and the availability of housing. Supported by these factors'[94] TAs can evaluate a person's economic and social links to a certain state to sustain taxation as a resident based on objective grounds.

The 183 days physical presence test establishes residence by counting the number of days an individual spent physically present in a state during a fiscal year, a calendar year, or during a period of years. This test is quite objective and, in most situations, makes identifying a person's tax residence rather simple. As a result, residence is often established by either proving one's actual presence in a state (physical presence test) or by using a set of events and circumstances (facts-and-circumstances test). However, one jurisdiction often uses many tests.

In some circumstances, residence can also be deemed or assumed to make a preliminary showing of residence based on the aforementioned elements, which may be utilized singly or in combination.[95] As a result, unless they can provide proof that they do not meet the requirements, those who are present in a country for 183 days or more during

92 Commentary on Article 4 of the OECD MTC, paragraph 4.

93 PIRES, Rita Calçada, "Manual de Direito Internacional Fiscal", p. 55.

94 Present in Article 4(2) of the OECD MTC

95 Paragraph 8 of the Commentary on Article 4(1) of the OECD MTC.

a tax year are considered residents. The burden of proving non-residence falls upon the taxpayers.

The typical effect of tax residence is the right for a state to tax the individual on his worldwide income.

2.4.2. Tax Residence of Legal Entities

It is important to note that Article 4(3) applies to both companies and other bodies of persons irrespectively of whether they are or not legal persons.[96] In general terms, a state has the power to tax the worldwide revenue of a legal entity that is a tax resident. The tax residence of legal entities is determined by the tax laws and procedures in the state in which it was founded or where it conducts business. The location of the management or actual seat, or the place of incorporation or legal seat, are often used.

i.) Place of Effective Management

The OECD MTC initially used the place of effective management for legal entities tax residence but provided no clear definition for it, besides referring to its essential and fundamental role in the business life.[97] Thus, scholars, courts, and TAs started constructing a definition of this concept. In 2000, the OECD introduced in the MTC commentaries[98] a group of factors that TAs should consider, offering some guidance on this definition. The commentary first stated that the place of effective management should be considered the place where the strategic management occurred. However, it soon became clear that this was not an exhaustive definition and that further circumstantial factors should be considered, maintaining the existing gap in this concept.[99] The first draft of Article 4(3) intended to not attach the tax residence of legal entities to formal criterions such as the registration, thus preference was given to the place of effective management. However, in 2017, it was revised again due to issues such as creating situations of double residence and tax avoidance, concluding for a case-by-case analysis instead.[100]

96 Paragraph 21 of the commentary on Article 4 (3) of the OECD MTC.

97 PIRES, Rita Calçada, "Manual de Direito Internacional Fiscal", p. 57-59.

98 Paragraph 24 of the commentary on Article 4 (3) of the OECD MTC.

99 PIRES, Rita Calçada, "Manual de Direito Internacional Fiscal", p. 57-59.

100 Paragraph 22 – 23 of the commentary to paragraph 3 of Article 4 of the OECD MTC.

Two theories emerged in respect of the definition of place of effective management, namely the place of central management and control[101] and the place of management.[102] These theories help clarify the place of effective management criteria outlined in the OECD MTC, since the OECD tries to develop its concept on the basis of both of these theories. Thus, the place of effective management can be described as the location of fundamental and central management and commercial decisions, as well as the location of the highest level of management, where the directors are located, and the location where the business is effectively run.

Nonetheless, the contracting states can attend to different criteria when solving such cases, namely to formal criteria such as place of registration, hence the solution is made on a case-by-case basis.

ii.) Place of Incorporation

The place of registration or incorporation test provides a certain simplicity and certainty for TAs and also for the legal entities.[103] However, the formal requirement of registration or incorporation is not as simple as it may seem, since an enterprise cannot generally change its place of registration without triggering a tax on gains that may have accrued in respect of its property, thus placing some limitations on legal entities for tax avoidance purposes.[104]

Many countries resort to this test, but usually complemented with other tests or factors, such as the effective place of management. Since businesses might perform

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101 This idea first appeared in the case of *De Beers* of 1906, when the Court determined that the location to be taken into consideration for establishing tax residence was the location where the directors were and exercised the true control over the company. PIRES, Rita Calçada, “Manual de Direito Internacional Fiscal”, p. 60-61.

102 Germany, the Netherlands, and Switzerland are examples of states that adopt this theory to develop the place of effective management criteria. It is supported by a distinction between place of effective management and place of ordinary management. *Ibidem.*

103 Typically, jurisdictions that position themselves on being tax havens provide simple and affordable options for incorporation under their domestic laws. *Ibidem.*

104 On the other hand, a change in the place of management can occur without incurring the same taxes as a change in the place of incorporation, and this test is readily abused for tax avoidance purposes. In this sense many countries adopted exit or departure taxes. ROHATGI, Roy, “Basic International Taxation”, p. 586.

worldwide operations and management activities that may be carried out in many jurisdictions within a tax year.

In this regard, the establishment of residence of legal entities can occasionally be challenging due to the informalities by which they can be formed. Bearing this in mind, partnerships fall under this consideration, and may be formed in some countries through conduct rather than by means of a formal legal document. In such cases, partners are taxed on their portion of a partnership's revenue, but the partnership itself is not taxed, making them viewed as transparent for tax purposes in many countries. In these situations, the partnership's residency is therefore irrelevant.[105] However, some states view a partnership as an autonomous taxable entity. According to Article 4, a partnership that is considered a corporation or a taxable entity in a state is a resident of that state and is thus eligible for treaty benefits. In this sense, the benefits of a tax treaty should be withheld from the partnership if it is treated as transparent, and should be granted to the partners if residents, just as they should be withheld from the partners if the partnership is considered an independent entity and resident of a contracting state.[106]

2.4.3. Dual Residency

Due to residence requirements being defined either in domestic tax legislation, through practice or by judicial rulings, a taxpayer might have a close personal relationship to two or more states.[107] As a consequence, an individual may be a dual resident and be subject to taxation under the domestic laws of two or more states for the same income. Alternatively, an individual might also not to be considered a resident in any tax jurisdiction.[108]

Dual residency problems depend on how states define the normative boundaries of their tax sovereignty, as opposed to double taxation conflicts, which are based on two or

105 ARNOLD, Brian J., "International Tax Primer", p.20.

106 ROHATGI, Roy, "Basic International Taxation", p. 24 - 25

107 *Idem*, p.135.

108 "Example – An individual who lives in Spain and whose center of economic interests is in France is subject to full tax liability in both states. If there is no DTC between France and Spain both countries would tax the person's entire worldwide income". LANG, Michael, "Introduction to the Law of Double Taxation Conventions", p. 2.

more objective connections to a state and are resolved by proof.[109] The resolution of the dual residency conflicts is usually done through tiebreaker rules that are established in DTCs, and these aim to attribute taxing rights to the residence state that presents more close connections with the taxpayer. These rules are present in the paragraphs 2 and 3 of Article 4 of the OECD MTC, for individuals and legal entities respectively.

When analyzing dual residence of individuals, the first tiebreaker rule concerns the place where an individual has a permanent home available, which can be in one or both contracting states. Usually, meeting this requirement is enough to end the conflict. This first rule states that residence is therefore, in cases of conflict, the place where the individual owns or possesses a home, in a permanent manner. This requirement implies that the individual must have access to any appropriate accommodations, regardless of their form, whether they are owned or not, as long as they are available continually and not only occasionally, for the individuals' use.[110]

If the individual has a permanent home in both or none contracting states, the second tiebreaker rule would be applicable, which deems the individual resident in the state in which his personal and economic relations are closer, being understood as the "center of vital interests"[111]. This criterion considers facts and circumstances such as "his family and social relations, his occupations, his political, cultural and other activities, his place of business and the place from which he administers his property"[112]. The following tiebreaker rules regard the place of the individual's habitual abode and nationality.

The "habitual abode" criteria refers to the location where the individual regularly resides. However, this criterion is not satisfied by only determining where a person spent more days; rather, it is related to the frequency, length, and regularity of visits that are more than temporary and are instead a part of a person's established routine.

109 NOGUEIRA, João Félix, "A Dupla Residência Fiscal de Pessoas Singulares: enquadramento da questão nos planos internos, europeu e internacional à luz da recente orientação do Supremo Tribunal Administrativo", *in* Revista de Finanças Públicas e Direito Fiscal, Maio 2011, p. 212-213.

110 Paragraphs 11-13 of the commentary on Article 4(2) of the OECD MTC, Article 4(2) a.) of the OECD MTC.

111 Article 4(2) a.) of the OECD MTC.

112 Paragraphs 14-15 of the Commentary to Article 4(2) of the OECD MTC.

Lastly, if there is still a conflict the resolution is made through the mutual agreement procedure (hereinafter, MAP)[113] of Article 25 of the OECD MTC.[114] This procedure can only be initiated if the above criteria are not satisfied.

For cases of dual residence of legal entities, the tiebreaker rules applicable are stated in Article 4(3) of the OECD MTC, and accordingly such conflict should be solved on a case-by-case basis by the contracting states TAs having the support of factors such as the place of effective management. Dual residence of legal entities may be a rare issue, nonetheless it is possible if one state grants preference to the registration and another to the effective place of management.[115] The Commentaries on this Article state that the place of effective management is where "key management and commercial decisions" are made, i.e., the location where the most important management decisions are taken at the highest level. Additionally, even though an entity might have several management locations, the comments contend that there can only be one place of effective management for each organization.

There are many different ways to define "effective place of management". The location of effective management might be the location of factual and efficient day-to-day management, the location of the highest level or policy-making body, or the location of shareholder control.[116] Even though in 2017, the Article 4(3) was amended in the sense of the cases of dual residence of legal entities to be solved by tax authorities (hereinafter TA) through the MAP, it still attends to the place of effective management criteria. In absence of a determination by the competent TAs the dual resident shall not be entitled to any relief or exemption under the convention, except to the extent and in such manner as it might be agreed upon by the competent TAs.[117]

113 The competent tax authorities of the two contracting parties are required to decide on the residence by mutual agreement if the tiebreaker provisions fail to make a person a resident of only one state for treaty purposes. This request may be made based on the probability that the person will be considered a tax residence under the two contracting states, and it has a 3 years' time limit since the first notification made by either of the contracting states concerning the tax residence. Paragraph 24 of the commentary on Article 4 of the OECD MTC.

114 Article 4(2) b.), c.) and d.) of the OECD MTC.

115 Paragraph 21 of the commentary on Article 4(3) of the OECD MTC.

116 ROHATGI, Roy, "Basic International Taxation", p. 73.

117 Paragraph 24.4 of the commentary on Article 4(3) of the OECD MTC.

2.5. Source State Taxation

Double taxation happens when in light of the different nexus there is a fact connecting a taxpayer to two or more jurisdictions, namely due to residence, source of income, or PE. Since double taxation is undesirable as it hinders cross-border trade, many states celebrated DTCs. In such agreements the contracting states determine which situations lead to the taxation by the source state and which lead to the taxation of the residence state.

To avoid double taxation, the OECD MTC provides two different types of provisions. Articles 6 to 21 of the MTC allocate to one of the contracting states the exclusive power to tax the capital or income items covered by those Articles. By forbidding the other contracting state from taxing the same item of income, double taxation is avoided. The exclusive right to tax is typically granted to the state of residence. In the case of other capital and income items, the right to tax is not exclusive of this state. Dividends and interest are two examples of items of income and capital that both states have the power to tax, but the total amount of tax that may be collected is limited.[118]

In this sense it's also important to emphasize the importance of the nexus that aim at defining the application scope of the law of a jurisdiction, in a cross-border conflict, consisting in a relation between the taxpayers, the objects and the facts.[119] The source nexus, along with residence, is a crucial component of international taxation since it gives the state where the income is created or produced the ability to impose taxes on that income. However, in contrast with residence, there is not a universal and general taxing right, which means there is not a full tax liability. There is only economic allegiance to the source state of the income generated thereof, and not a connection with the taxpayer. Thus, the source state is only granted limited tax liability. Moreover, if the residence state jurisdiction overlaps with a source jurisdiction, double taxation relief is often expected from that state. This means that the state of residence has a supplementary right to tax the taxpayer's income that is earned or sourced elsewhere.[120]

Thus, there are two theories appointed for the justification of source taxation, the benefits principle, and the economic allegiance. The latter is based on the idea that source taxation makes the state where the income is generated have a stronger economic

118 ARNOLD, Brian J., "International Tax Primer", p. 18

119 XAVIER, Alberto, "Direito Tributário Internacional", p. 224.

120 ARNOLD, Brian J., "International Tax Primer", p.22.

allegiance for the taxation; in other words, even though the residence state maintains an economic connection, the one from the source state is more coherent. The economic allegiance principle is based on four elements that demonstrate an economic allegiance, such as the origin of the wealth, the situs of the wealth, the enforcement of the rights to wealth, and residence and domicile.

The benefits concept, on the other hand, allegedly derived from a study on double taxation in 1923.[121] This principle's reasoning is that the source jurisdiction offers the foreign legal entity specific benefits, such as services, infrastructures, policy, and education, as well as assures the enforcement of payments, directly or indirectly.[122] Therefore, taxes collected are seen as the price paid for all services given by the source state, and all states are granted the right to tax depending on the goods and services (benefits) received. This concept has historically been used to support source taxation on both residents and nonresidents. The benefits that nonresidents take advantage is what supports source state taxation and serves as the basis for non-resident taxation. However, this idea may also be used to support residence state taxation, with the justification that paying such taxes is recompense for using the products and services offered there. As a result, many argued that this principle's applicability to the distribution of taxing rights was condensed and did not fundamentally impact ITL core principles.[123]

Despite the importance placed on source jurisdiction, domestic tax legislation and DTCs tend to under develop this idea. We have to consider that unlike residence, source is usually not defined in domestic laws, it is usually an implicit concept on other rules.[124] In fact, states normally do not even include the term source state in their domestic tax laws, and neither does the MTC, instead they refer the term "other state". However, the

121 "Report on Double Taxation submitted to the Financial Committee – Economic and Financial Commission Report by the Experts on Double taxation", April 1923. Available at https://adc.library.usyd.edu.au/view?docId=split/law/xml-main-texts/brulegi-source-bibl-1.xml;chunk.id=item-1;toc.depth=1;toc.id=item-1;database=;collection=;brand=default

122 OATS, Lynne, MILLER, Angharad, MULLIGAN, Emer, "The principles of International Taxation", p. 23-35.

123 PEREIRA, Paula Rosado, "Princípios do Direito Fiscal Internacional: do paradigma clássico ao direito fiscal europeu", p. 76-78.

124 As an example, "withholding tax imposed on amounts paid by residents to nonresidents has an implicit source rule that such amounts are sourced in a country if they are paid by a resident of the country". ARNOLD, Brian J., "International Tax Primer", p.22.

OECD MTC provides rules that function effectively like source rules, such as the rule of income derived from immovable property, where even if the taxpayer is a resident of a contracting state the income will be taxed by the state in which the property is located.[125] Considering this and Article 7 of the OECD MTC, the source state can only tax the revenue of a nonresident legal entity if it has a PE, which calls for a reliable fixed place of business, such an office or factory. The legal entity must have a physical presence in the source state to be subject to taxation on revenue provided by the PE therein.

Therefore, depending on the type and character of the income, the source provisions differ greatly, and they have as main function to impact the credit awarded by the residence state for the taxes paid abroad on the foreign sourced income. Therefore, source regulations determine whether nonresident taxpayers are taxable in the source state and if they are eligible to claim foreign tax credits for such taxes in the state of residence.[126]

2.6. Permanent Establishment

The concept of PE and its relevance on the allocation of taxing rights was gradually defined in part because of research conducted by international organizations. The League of Nations' initiatives in the MTCs of London and Mexico were the first to contribute to this idea. The OECD also developed its own concept based on the shared elements of the DTC celebrated until there between the contracting states. They refined this idea until it was widely accepted internationally.[127]

This concept arose as a result of the significant expansion of economic activity outside of the scope of conventional action plans, namely the relation of such activity to other jurisdictions and the establishment and maintenance of strong economic links with such jurisdictions. As a result, the idea presently defined in Article 5 has received widespread international approval and strong support from the contracting states. Even if there are many DTCs with varied definitions of PE, it can be said that there is a certain amount of harmonization in this sense.

125 Article 6 (1) of the OECD MTC.

126 ROHATGI, Roy, "Basic International Taxation", p. 155 - 157.

127 PEREIRA, Paula Rosado, "Princípios do Direito Fiscal Internacional: do paradigma clássico ao direito fiscal europeu", p. 131-132.

The general definition of PE is found on Article 5 of the OECD MTC, and this Article defines the relevant criteria to determine its existence. From there two types of PE can be distinguished, an actual PE, and a deemed PE. The former is present in Article 5(1), and it establishes that a PE is a "fixed place of business, through which the business of an enterprise is wholly or partly carried on", and in accordance with this definition, there are multiple conditions that need to be met to qualify the existence of an actual PE. These conditions concern the main rule present in Article 5(1) and (2) for the existence of an actual PE.

The first condition refers to the *existence of a place of business*, and this notion compasses all property and tangible goods, namely buildings, premises, installations, machinery and even leased equipment if it is "undertaken with an entrepreneurial activity".[128] And this place must be at the disposal of the enterprise, the mere presence is not sufficient, it depends of the effective legal power to use that location.[129] Secondly, this place must be *fixed* in terms of time and location. Thus, it requires a certain degree of permanence, not forever, but it cannot be occasional or temporary. Experience has shown that places are not usually deemed to be a PE if they were held for less than six months, and in contrast, it shows that places held for over that period of time were considered PEs. It involves a certain recurrent nature of the activities, nonetheless temporary interruptions of activities do not cause it to cease to exist.[130] Additionally, there must also be a link between the place and a geographical point, including "neighboring locations".[131] Lastly, the *activity must be carried through the fixed place of business*. In this matter it is important to underline that they do not need to be of a productive character, rather they need serve core or substantive business activities and generate profits that arise wholly or partly from the activities of the PE. The existence of staff in the state where the PE is located is designated as an indicator of the performance of an activity through the fixed place of business. This includes employees and any other sort of individuals who

128 Paragraphs 10-11 of the commentary on Article 5(1) of the OECD MTC.

129 *Idem*, paragraphs 12-19.

130 *Idem*, paragraphs 28-34.

131 Neighboring locations can bring difficulties if whether there is a single place of business or more. If two places are occupied and the requirements of Article 5 are met for both, the enterprise will have two PEs. Nonetheless, certain activities require to move from one location to another such as mines, having a commercial coherence in the fact that the activities are carried out within a geographic area and are considered a single place of business. *Idem*, paragraphs 20-27.

were given instructions that would seek the development of the activity in that condition.[132]

As referred, there are other unique circumstances that lead to the establishment of a PE, which are the situations laid out in Article 5(3) and (5) – deemed PE rules – such as, the construction site PE and the agency PE. This is because many different sorts of businesses that do not require the operation of a physical place of business would not be relevant if the definition and conditions of PE were too strict. As a result, the MTC broadens the definition of PE to encompass some dependent agents who work on behalf of an organization and construction sites.

The latter is appointed as not a real deemed PE situation, but, in fact, should be regarded as extra requirements that must be fulfilled for a construction site to qualify as a PE. In other words, a construction site needs to meet the requirements of a fixed place of business under Article 5 (1) and needs to last for at least 12 months.[133],[134] In this sense, a PE is considered to exist from the moment the construction works start, including all the preparatory activities made in that state, and it is said to be ceased when the construction or renovation is finalized, or until it is considered permanently abandoned.[135]

According to Article 5(5), if a person (commonly referred to as a dependent agent) has the capacity to conclude contracts that are binding on the resident and regularly exercises it on the resident's behalf, the resident is regarded to have a PE in the other contracting state. This deemed PE rule establishes the agency PE, which creates a PE in the cases where an individual or legal entity, without being residents or having a fixed place of business in that state act on behalf of an enterprise.[136] This rule works as an alternative to the actual PE rule established in the first paragraph since it does not require a fixed place of business, nonetheless it requires regularity, valuing the permanence

132 Paragraphs 35-42 of the commentary on Article 5(1) of the OECD MTC.

133 Article 5(3) of the OECD MTC.

134 Regarding the 12-months temporal threshold, it has given rise to abuses such as the division of the contracts in several parts, each covering a period of less than 12 months, and attributed to different companies that where in fact part of the same group. Paragraph 52 of the commentary on Article 5(3) of the OECD MTC.

135 *Idem*, paragraphs 54-55.

136 PIRES, Rita Calçada, "Manual de Direito Internacional Fiscal", p. 85-86.

element of the PE concept.[137] Nevertheless, independent agents are excluded from this rule.[138]

Other rules present in Article 5, include an exemption from the definition of PE for fixed places of business that are used exclusively for certain preparatory and auxiliary activities, such as the distribution or storage of commodities, the upkeep of the company's stock, the acquisition of items, and information gathering for the company.[139] This is known as the *de minimis* exception for the definitions of PE previously provided in the other paragraphs of this Article. Therefore, the business activities present in this paragraph, even when carried through fixed places of business are not sufficient to constitute a PE.[140]

The PE is a tax term that denotes a certain degree of business activity in the source state, and it is particularly crucial for the taxation of business profits in Article 7, as well as for the taxation of dividends, interest and employment income.[141] This significance is that Article 5 defines the threshold above which the source state may tax business profits earned in that state by a resident of other contracting state. In this sense, it is crucial to briefly review the rules outlined in Article 7 regarding the allocation of profits to the PE. The first paragraph forbids the attribution of unrealized earnings inside an enterprise; instead, the PE's attributable gains are limited to a small percentage of the business's overall profits.[142] However, this Article also advances the notion that a PE should be regarded as a separate legal entity[143],[144], with profits being calculated in accordance with

137 Paragraphs 83-88 of the commentary on Article 5(5) of the OECD MTC.

138 Article 5 (6) and (7) of the OECD MTC.

139 Article 5 (4) of the OECD MTC.

140 Paragraph 58 of the Commentary on Article 5(4) of the OECD MTC.

141 Articles 10, 11 and 15 of the OECD MTC.

142 Article 7(1) of the OECD MTC.

143 Article 7(2) of the OECD MTC.

144 Additionally, paragraph 7 outlines that a subsidiary itself does not constitute a PE of its parent company and vice-versa. This follows the above stated principle that, for the purpose of taxation, such subsidiary company is regarded as an independent legal entity. Paragraph 115 of the commentary on Article 5(7) of the OECD MTC.

the arm's length principle.[145] This means that a PE is not a separate legal entity from the main enterprise, its autonomy in taxing terms implies a patrimonial autonomy and a capacity to assume real legally binding obligations with third parties. Because a branch or PE is not a legal entity and cannot operate on its own, it differs from subsidiaries in that its assets and operations are truly those of the business to which it belongs.[146] Article 7(2) outlines a two-step process for determining the profits attributable, with the first step involving a functional and factual analysis of the PE to determine the functions performed, the economic ownership of the assets risk assumed, and identify any potential dealings with other related enterprises. The second step involves applying the transfer pricing rules, by analogy, to those dealings to establish an arm's length price. The changes made to this Article have been controversial, and many OECD contracting states have entered reservations, namely due to difficulties in applying the transfer pricing rules to PEs.[147] The taxation of business profits attributable to the PE in the terms of Article 7 originates from the economic allegiance theory, since there is a strong economic connection between a PE and a given territory.[148] This concept represents a concession of the residence principle, in the sense that it allocates the exclusive taxing rights to the residence state in all circumstances when it concerns business profits, except if they are attributable to a PE. Thus, source state taxation is rejected in respect of any other of business income except the ones attributable to a PE in that state.

Therefore, the concept of PE acts a minimum threshold for a state to tax nonresidents' business profits that originate in the source state where they conduct business. And is often described as a legal fiction that expands source state taxation to nonresident legal entities that are otherwise not subject to an income tax in that state, and where no further connection to the territory exists.

Article 1 of the OECD MTC indicates that the PEs are not considered "persons", and as such are also not residents of either one of the contracting states. However, this raises another question in this subject. As DTCs are applicable to individuals residing in

145 This principle or method implies the "establishment of transfer prices in a transaction between related parties based on the prices charged (or sometimes the profits derived) in similar transaction between unrelated persons". This rule is applicable to the distribution of earnings from transactions with the enterprise's main office and other PEs. ARNOLD, Brian J., "International Tax Primer", p. 209.

146 ARNOLD, Brian J., "International Tax Primer", p. 178.

147 *Idem*, p. 179.

148 PIRES, Rita Calçada, "Manual de Direito Internacional Fiscal", p. 74-75.

one or both contracting states, and this does not include PEs, they are unable to take advantage of the DTC's benefits.[149] Due to the DTC's restriction on its application to residents, ties between PEs situated in both contracting states and belonging to residents of third contracting states are not covered by the DTCs. Therefore, even while these conflicts accept the presence of PEs situated in a third state, the DTC are only relevant to disputes between two residents of the two contracting states. These disputes are referred to as "triangular cases". This is, where a resident of a state has a PE in another state, and it generates income from a third state. The three states in conflict are then considered residence state, source state and state where the PE is located. The OECD recommends that in such situations the DTC to be considered should be the one between the state of residence of the taxpayer and the state where the PE is located, as a way to avoid treaty shopping abuse.[150]

Lastly, it is also worth mentioning BEPS Action 7 that aims to address artificial avoidance of the PE status as defined by the OECD MTC. However, the current thresholds requiring direct presence through the use of a dependent agent or a physical presence in the source state can already be bypassed without artificiality, especially by digital businesses that sell products online in several countries without even having a PE. With the rise of digital commerce, businesses may now continuously earn substantial commercial income from certain locations without having any form of physical presence there. As a result, it is presently being debated the adequacy of current definitions and provisions for the allocation of taxing rights with regards to corporate income.[151]

As a result, in today's globalized business environment, the validity of source-based taxation, particularly regarding the PE concept and its thresholds, is questioned despite OECD's efforts. And many advocate for redefining the current PE thresholds.

149 Even though they are granted some types of benefits. *Idem*, p. 142-143.

150 XAVIER, Alberto, "Direito Tributário Internacional", p. 125-127.

151 PEREIRA, Paula Rosado, "Princípios do Direito Fiscal Internacional: do paradigma clássico ao direito fiscal europeu", p. 145.

Chapter III – International Taxation in the Time of COVID-19

3.1. Brief Overview

The adoption of lockdowns, the confinement of billions of people and the suspension of international travel alongside other public health measures adopted during the pandemic had a profound impact, demonstrating that while being rare events, these extraordinary circumstances affect all individuals and businesses equally. Due to several unprecedented measures adopted, obstacles were presented on a global scale. Employees were forced to remain in their current locations, becoming sometimes stranded in countries where they might have not otherwise been, while others relocated based on these constraints to countries of their nationality, or of previous residence.

Businesses shifted from on-site to remote work models in response. And many companies feared tax repercussions due to these temporary dislocations of their employees or agents working on the company's behalf. All these temporary displacements have tax consequences for individuals and businesses. And naturally, all this increased uncertainty over the determination and establishment of tax residence for all affected individuals, in what concerned both the application of national and DTC tax residence rules. This situation created an interesting and unprecedented debate in international taxation regarding the application of tax residence rules. And as result and being tax residence a concept of undeniable relevance and importance, there is a need to further research the modifications occurred.

Based on this background, it's also critical to keep in mind that this dissertation's goal is to analyze the effects of the COVID-19 crisis on taxpayers' tax residence and on the application of DTC rules. To achieve this, we will take into consideration OECD publications on the subject, as well as administrative guidance on how certain jurisdictions have handled these situations.

3.2. Effects of COVID-19 From the Perspective of Articles 4 and 5 of the OECD MTC

In this chapter we address the main difficulties and practical challenges posed by COVID-19 and the public health measures adopted on ITL, which consequently affected the application of Articles 4 and 5 of the OECD MTC.

Given the emphasis on physical presence for individuals and place of effective management for legal entities, there were concerns about unintentionally establishing tax residence, PEs, and additional tax liabilities during this crisis.

3.2.1. Impacts on Tax Residence of Individuals

In what concerns individuals, the concept of tax residence, as seen, is mostly tied with physical presence, namely with the 183 days physical presence test adopted in the majority of the jurisdictions. Given that physical presence will often provide certain states with jurisdiction to tax, it is easy to understand the concerns raised during COVID-19 in this respect, since this criterion is precisely what was impacted by the public health measures adopted.

Hence, despite having intended to travel back to other jurisdictions, many taxpayers were unable to do so due to the restrictions put in place. As a result, many taxpayers ran the possibility of being regarded as tax residents in jurisdictions where they had no intention of settling in, and in which case they would be subject to local taxes on their worldwide income. And to make matters worse, there is a good chance that the same taxpayer would also be regarded as a tax resident at its original domicile, where they still maintained a center of vital interests, a permanent home, or a habitual abode. Due to dual residency issues, the taxpayer could end up being regarded as a resident of two or more states, and even subject to double taxation.

To put this problematic in practical terms, we will consider the following scenarios:

a.) A person who normally lives in state A travels for brief trip to state B, where they remain due to restrictions for more than 183 days, and as such being consider a tax resident therein, despite maintaining a home, family, and domicile in state A.

b.) A person who normally lives in state A returns temporarily, due to the public health measures, to state B, which was their previous home jurisdiction.

Besides the above-mentioned situations, we will examine other scenarios specifically related to employment income that were impacted due to the COVID-19 restrictions, and that indirectly concern tax residence. These situations regard Article 15 of the OECD MTC[152] that governs the taxation of employment income and distributes taxing rights between the employee's residence jurisdiction and the location where they work. The default rule establishes that "salaries, wages and other similar remunerations" derived by a resident are taxable only in the persons state of residence, except if "the employment is exercised"[153] in the source state. Nonetheless, there are also certain conditions that need to be met, namely (i) the 183 days physical presence test, (ii) the employer is a resident of the source state, or (iii) the employer has a PE that bears the remuneration in the other jurisdiction.[154]

Throughout the period when the public health measures were in effect, the following practical scenarios arose:

c.) Cases where subsidy wages or COVID-19 related government subsidies were paid to cross-border workers that could not perform their employment activities due to the public health restrictions.

d.) Employees who became stranded in states where they are not residents but had previously exercised an employment.

e.) Employees who performed their activities remotely from a state and the employer is resident in another state.

Therefore, it is clear that the public health measures could negatively affect one's tax residence and employment income taxation, under both ITL and national tax laws since it is usually considered the number of days an individual spends in state during a tax year.[155]

152 "(…) salaries, wages, and other similar remunerations derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.". Article 15(1) of the OECD MTC.

153 The commentaries further explain what is meant, by this second part of the default rule, is the location where the employee is physically present when performing the employment activities. Paragraph 1 of the commentary on Article 15 of the OECD MTC.

154 Article 15(2)(a) of the OECD MTC.

155 The above-mentioned situations illustrate how new taxing rights over employment income can possibly arise in other jurisdictions and may displace existing taxing rights as well as require further tax measures such as refunds.

3.2.2. Impacts on Tax Residence of Legal Entities

Given that most jurisdictions have in place as criterion for determining a legal entity's tax residence, the place of effective management, it is extremely likely that this requirement was affected by the travel constraints. And as a result, senior management meetings possibly took place from different countries, and the jurisdiction where the control or management of a company was exercised might have transiently changed to a new jurisdiction. In this regard, the following practical scenario will be considered:

f.) A legal entity that has its most crucial decisions taken in state A and is therefore a tax resident therein, however during the pandemic the company may have such decisions taken from a multiplicity of jurisdictions through remote meetings, and consequently may return to have its residence where it was incorporate which can be in a different state, for an example in state B, implying different taxation rules and rates.

3.2.3. Impacts on the Concept of PE

In this section, the challenges regard if the presence of employees working from home created a taxable nexus for the employer in that state, namely through the figure of a PE, in the terms of Article 5 of the OECD MTC. Such situations arise due to the COVID-19 constraints where basically all companies were forced to close their offices, and to continue to do business, different solutions needed to be pursued, such as remote working. Regarding the PE figure, the relocation of individuals from their typical workplaces caused a multitude of practical challenges, namely:

g.) Possibility of establishing a fixed place of business in a different jurisdiction, namely at employees' homes, given that their roles are now performed from their residences.

  a. Creation of agency PEs when the activities of an individual temporary working from home, for a non-resident employer, would give rise to a dependent agent PE under Article 5(5).

h.) Creation of a construction site PE, which could be formed due to the suspension time of the construction due to public health restrictions.

3.3. Review of the OECD and the MTC Suggested Solutions

In this chapter, we intend to evaluate if the current OECD MTC provisions were able to cover the above-mentioned situations without major distortions in the allocation of taxing rights, as well as analyze the guidance issued by the OECD on this matter.

In this sense, the efforts put in place by the OECD during the COVID-19 pandemic cannot be ignored, having issued continuous guidance and suggestions to governments throughout the affected period to help support member jurisdictions. The first report issued by the OECD, on this matter, was on the 3rd of April of 2020[156], and such report examined the major impacts arising from the COVID-19 related restrictions in place at the time, and their effect on the provisions of the DTC following the OECD MTC. Namely, it considered the problems arising from the delocalization of employees putting at risk the existence of a PE in other states; the possible migration of the tax residence of legal entities, and the problems arising for the establishment of the tax residence of individuals. The guidance sought to provide an urgent response to requests from several concerned countries that had taken unprecedented measures to restrict people's mobility as a result of the COVID-19 outbreak.

The efforts of the OECD were continuous during this period, and as such they published additional and updated guidance on the impacts of the pandemic on DTC provisions.[157] This updated guidance aimed to tackle the issues raised by the pandemic in the figure of PE, the application of the tiebreaker rules, and the treatment of income from employment, being additional fact patterns not addressed previously.

In what regards the legal value of the OECD's COVID-19 guidance, as stated within the document itself, it is a policy measure that was issued in response to multiple requests from member jurisdictions. Its primary objective is to serve as an interpretative aid to governments and TAs in dealing with the COVID-19 crisis in what concerns the interpretation of DTC provisions. The guidance largely aligns with principles and interpretations already outlined in the OECD MTC provisions and commentaries. Given this, we consider this guidance to have the legal value of soft-law and non-binding

156 OECD, Secretariat analysis of tax treaties and the impact of the COVID-19 crisis, in OECD, 3 April 2020. Available at https://www.oecd.org/coronavirus/policy-responses/oecd-secretariat-analysis-of-tax-treaties-and-the-impact-of-the-covid-19-crisis-947dcb01/.

157 OECD, "Updated guidance on tax treaties and the impact of COVID-19 crisis", 21 January 2021. Available at https://www.oecd.org/coronavirus/policy-responses/updated-guidance-on-tax-treaties-and-the-impact-of-the-covid-19-pandemic-df42be07/

character for OECD member jurisdictions, similar to the value attributed to the OECD MTC and to its commentaries. However, while not legally enforceable, the guidance, as the OECD MTC commentaries and other similar policies issued in the past, have a persuasive weight and can influence decision-making, even in the absence of DTCs and for non-OECD member jurisdictions. Nevertheless, the ultimate determination and application of the guidance depends on individual jurisdictions and their domestic laws. Each country has the autonomy to interpret and implement the guidance to its own legal framework as they see fit. Therefore, while the OECD’s COVID-19 guidance provides valuable interpretative aid, the specific legal implication and enforceability may vary across jurisdictions.

Furthermore, it is important to highlight that such guidance is intended to be only applicable during the COVID-19 pandemic, which means, during the period of time in which the public health measures were in force and while there were impacts on DTC rules as a result of such restrictions, assuring that they could not be taken in advantage to create situations of non-taxation and used outside of their intended scope.[158]

i.) In matters pertaining to the tax residence of individuals

The aforementioned situation in *paragraph a.)* poses the subject of dual residence of an individual as a result of public health measures. Nonetheless, in this scenario, the OECD’s view is that such situation would be satisfactorily resolved through the tiebreaker rules of the DTCs.[159]

Taking a closer look at such scenario, what would arise is that an individual would have been considered a tax resident of both contracting states. In this sense, he would be considered a resident of one of the jurisdictions on the basis of having spent more than 183 days in such state, but would, at the same time still be considered resident of the other state, probably due to still maintain a permanent home, habitual dwelling, family ties and/or employment in that jurisdiction, since this was the state where he maintained tax residence previously to becoming stranded in a different country for more than 183 days.

158 The administrative guidance adopted by some jurisdictions, e.g., UK, France, and Ireland, included precise dates and time periods during which such guidance and administrative clarifications were relevant providing assurance that these extraordinary measures and/or interpretations to deal with COVID-19 impacts of tax residence would not be applicable outside of their intended scope.

159 OECD, “Updated guidance on tax treaties and the impact of COVID-19 crisis”, p.14.

The OECD's view of this circumstance is that, if the tiebreaker criteria outlined in Article 4(2) of the OECD MTC was followed, that would suffice, or in worst case scenario, would prompt action from the responsible authorities of both contracting states. This logic is supported by the fact that in a brief travel to another state, the affected individuals would not, in theory, have a permanent home accessible to them in the other state where they were stranded owing to public health measures[160], and the first tiebreaker rule[161] would then likely find them to still be residents of their customary residence jurisdiction. This means, the residence/home jurisdiction would still be awarded taxing rights in these circumstances without experiencing any significant distortions.[162]

Hence, the tiebreaker rules of most DTC based on the OECD MTC would have successfully cleared the dual residency issues emerging in similar scenarios caused by the public health measures.[163] Nonetheless it is important to consider that such solution is only available in cases where a DTC is available, and when the affected individual is a resident of one or both contracting states.

Considering the situation present in the *paragraph b.)* of the above sub-chapter, a different factor arises, which, normally, complicates the assessment of tax residence, namely returning to a previous residence jurisdiction. Situations like these were quite usual, where many individuals returned to their nationality or origin states[164] during the pandemic crisis, due to concerns towards relatives and/or friends.

Concerns emerged in this scenario because under national tax laws of the concerning states, the affected individuals could have never lost their tax residence status in the previous home jurisdiction, or even regain tax residence therein. In these cases, it would often lead to a decision by the competent TAs, since personal and economic ties

160 And even, if by any events they would have constituted meanwhile a permanent home, or had previously a permanent home, in the source jurisdiction, the following tiebreaker rules would end up deeming the residence state taxing rights, since most ties would still remain in that jurisdiction, namely the center of vital interests, habitual abode, and even probably nationality. *Ibidem.*

161 "He shall be deemed to be a resident only in the state in which he has a permanent home available to him;". Article 4(2)(a) of the OECD MTC.

162 OECD, "Updated guidance on tax treaties and the impact of COVID-19 crisis", p.14, paragraphs 43 and 44.

163 OECD, "Secretariat analysis of tax treaties and the impact of the COVID-19 crisis", p.6.

164 Such situation would encompass individuals who moved from their origin or nationality countries, where they previously held residence for tax purposes, namely emigrates, and expatriates.

and attachments to the other jurisdiction are stronger. Even with the application of the tiebreaker rules[165], it would still produce a more uncertain result than usual.

In what regards the scenario illustrated in *paragraph c.)* it is important to mention because that this was a specific tax measure adopted by some countries during the pandemic.[166] Without specific guidance on how to treat this income, such fact pattern could have led to distortions in the allocation of taxing rights, or even to double taxation. In this sense, the OECD proposes a comparison between termination payments and COVID-19 related wage subsidies.[167] This scenario concerns situations where Governments intervened to subsidize employees to keep them in a company, whilst they are unable to perform their work duties due to COVID-19 restrictions. This follows the fact that not all work duties, or types of work are able to be performed remotely. Specifically, this affected the cases of cross-border workers, who reside in one jurisdiction but exercise their employment in another and were during a certain period of time unable to do that, however, would still receive income. This could lead to a different allocation of taxing rights over that income, or to double-taxation of such income.

Hence, the OECD's advice in such situations is that since such COVID-19 related subsidies are compared to termination payments[168], and these are, according to the OECD MTC commentaries[169] attributable to the place where employment is usually excised (which is in the case of cross-border workers a different jurisdiction), in this case such wage subsidies should be attributable to the work jurisdiction.[170] Therefore, the

165 Nonetheless, the criteria of habitual abode could be the most successful in solving the dual residency issue in this scenario, in the sense, an individual cannot live "habitually" and "customarily" in two places. This criterion refers to the frequency, regularity, and duration of the stays, and not only to the number of days spent in one jurisdiction. Paragraph 19 of the commentary on Article 4 of the OECD MTC.

166 I.e., Greece that considered that for tax treaty purposes "payments that employees receive from their employments despite restrictions to the exercise of their employment (i.e., wage subsidies) fall within the scope of Article 15 OECD Model and are attributable to the place where employment used to be exercised before the COVID-19 outbreak". OECD, "Updated guidance on tax treaties and the impact of COVID-19 crisis", p.20.

167 *Idem*, p.15.

168 Termination payments are situations where either by law or contract the employer must provide a period of notice before terminating employment, and in during such time the employer may require the employee not to work, however, he is still paid an employment remuneration for such period.

169 Paragraph 2.6. of the commentary on Article 15 of the OECD MTC.

170 OECD, "Updated guidance on tax treaties and the impact of COVID-19 crisis", p.15.

commentaries to Article 15 of the OECD MTC, solve such situations by attributing such income to the work jurisdiction, since COVID-19 related subsidies from work, either paid the employer or the government. maintain the relationship with the employer.[171]

The scenario described under *paragraph d.)* aims to cover all the situations where individuals who are residents in one jurisdiction, but exercised employment in another jurisdiction and have become stranded therein due to public health measures. This situation usually needs to consider further factors, such as the prevention of leaving the source jurisdiction due to the restrictions in place and also the intention of leaving, if possible, of the individual. Under the OECD's MTC rules the affected individual would be a resident of one jurisdiction, and be exercising the employment activities in another jurisdiction, and as such this latter state could tax the employment income, meeting certain requirements, such as the 183 days physical presence test.

According to the commentaries on Article 15[172] and the OECD's view, such double taxation would not occur, considering the exception made for the computation of the 183 days test regarding the "days of sickness". Here it is stated that if such scenario prevents the individual from leaving, and he would have otherwise failed to meet the requirement for source taxation of the income, under Article 15(2) of the OECD MTC, these days will not count towards the 183 days test. This already established exemption, would end up covering situations where individuals were quarantined, sick, or prevented from international travel either by public health measures or cancellation/absence of flights.
This would lead to the days spent by an individual to be disregarded as days spent in the source jurisdiction as a result of COVID-19 restrictions, and such state could not exercise taxing rights under the terms of a DTC, which would have normally been entitled to.[173]

Nonetheless, it is also important to note that some jurisdictions may have taken a different approach.[174]

The scenario stated in *paragraph e.)* concerns individuals working remotely from one state, when the employer is a resident of another state. It covers situations such as an

171 Therefore, the residence state would need to provide relief, in the terms of Article 23 of the OECD MTC, by either exempting the income or by taxing it and granting a credit for the tax paid to the other jurisdiction, in order to avoid double taxation. *Idem*, p.16.

172 Paragraph 5 of the commentary on Article 15 of the OECD MTC.

173 OECD, "Updated guidance on tax treaties and the impact of COVID-19 crisis", p.16.

174 I.e., Sweden did not follow the OECD's suggestion on this topic. OECD, "Updated guidance on tax treaties and the impact of COVID-19 crisis", p.16.

employee who is a resident in one jurisdiction and normally exercises his employment in another, but as a result of COVID-19 restrictions started exercising his employment from the residence state. Under the terms of Article 15 this means the state where the employment was previously exercised would lose its taxing rights, as a result of public health measures in force. In this case, if the employer did not meet other additional requirements of Article 15, namely, to be a resident in that jurisdiction, or to bear the remuneration through a PE, there would be a complete loss of this state's taxing rights over the employment income as a result of COVID-19 restrictions.[175]

The OECD's view[176] on such effects is that exceptional cases call for an exceptional level of coordination between jurisdiction to mitigate these effects, and as such the involuntary and temporary changes in the usual place of where the employment is conducted should be solved through the MAP, which is already a solution provided for in the OECD MTC.[177] However, the MAP clause application would not have been triggered automatically.

ii.) in matters pertaining the tax residence of legal entities

The consequences to the residence of legal entities relate to the dislocation of their place of effective management. Nonetheless, the OECD considered this in its guidance as a rare and uncommon circumstance in real practice[178], and stated that such situations would not occur as a result of public health measures. Additionally, it is significant to remember that such circumstances were already identified and taken into consideration in the OECD MTC commentaries and were made clear to be resolved on a case-by-case basis.[179]

Legal entities worried that as a result of COVID-19 restrictions and of relocations and inabilities to travel of the senior executives of a corporation, would have consequently a change in company's residence under relevant tax laws and affect the jurisdiction where

175 Just because the employee would not spend the 183 days normally spent in the jurisdiction where the employment was usually performed, there was an absolute loss of the source state's taxing rights over employment income.

176 OECD, "Updated guidance on tax treaties and the impact of COVID-19 crisis", p.17.

177 *Ibidem.*

178 OECD, "Updated guidance on tax treaties and the impact of COVID-19 crisis, p.9, paragraph 29.

179 Paragraphs 21 and 23 of the commentary on Article 4 of the OECD MTC.

a company is regarded as a residence for tax purposes.[180] In this sense, even if the scenario illustrated above created a situation of dual residence of a legal entity, the competent TAs, should assess the place of residence of the entity, having in mind the spirit of the commentaries, where the relevant facts should be examined under “usual” and “ordinary” circumstances[181], which does not in principle include cases that resulted due to COVID-19, and would result of no impact to the company’s previous tax residence of a company.

Another fact to consider under this scope is the different tie breaker rule set forward in DTCs based on the OECD MTC before 2017, where the tiebreaker rule for the establishment of residence in dual residency cases is the place of effective management. This criterion refers as a consequence to the place where the key management and commercial decisions are conducted for the entity as a whole to solve dual residency cases, as opposed to a case-by-case analysis. Nonetheless, the point of view taken, based on the commentaries[182] is that this should be examined at light of the usual place of residence of most senior executives, where they usually conduct these decisions, and therefore, the exceptional and temporary period when these decisions were conduct elsewhere would not affect the tax residence of the legal entity.

Hence, the OECD’s position[183], and in light of the MTC, no negative impact should result for the establishment of tax residence of legal entities, since it has in consideration the location of the actual management of a company, and not only a temporary relocation of its key management.

iii.) In matters pertaining the creation of a PE

Having in consideration the situation aforementioned in the above *paragraph g.)*, which was one of the most raised concerns, by both individuals and companies, during the time period affected by the public health measures, the general understanding

180 OECD, “Secretariat analysis of tax treaties and the impact of the COVID-19 crisis”, p.4.

181 “Competent authorities having to apply paragraph 3 would be expected to take account of various factors, such as where the meetings of the person’s board of directors or equivalent body are usually held, where the chief executive officer and other senior executives usually carry on their activities, where the senior day-to-day of the person is carried out, where the person’s headquarters are located, which country’s laws govern the legal status of the person, where its accounting records are kept (…)”. Paragraph 24.1 of the commentary on Article 4 of the OECD MTC.

182 Paragraph 149 of the commentary on Article 29 of the OECD MTC.

183 OECD, Secretariat analysis of tax treaties and the impact of the COVID-19 crisis, p.4.

established by the OECD was that a company should not be considered to have established a PE of its employees when they are temporarily home-based or unable to work in their regular office and tax jurisdictions due to the pandemic crisis. [184]

This understanding follows the already established rule in most DTC, where a temporary and extraordinary circumstance does not fulfill the requirements for the creation of a PE under the terms of Article 5 of the OECD MTC. For the creation of a PE there is a certain degree of permanence[185] that needs to be achieved, and since the home office, as a result of closing offices due to public health measures, merely constitutes a temporary arrangement that would not justify the creation of a PE. Furthermore, in this scenario, the home office of the employee is not "at the disposal"[186] of the employer per se, there is in fact, no effective power of the enterprise over the employee's home. Therefore, once again, under the terms of the requirements present in Article 5, a PE would not arise in this scenario.

Additionally, a foreign employee or agent who temporarily works from home and executes contracts in the name of his non-resident employer in the tax jurisdiction in which he resides should also not be regarded as routinely performing the enterprise's obligation to execute contracts on its behalf. Also, the company should not be regarded as having appointed a permanent employee as an agent in that tax jurisdiction. This scenario, as a result does not fulfill the most enhanced requirement of the agency PE under the terms of Article 5(5)[187], which is habituality.[188]

Both OECD interpretations on this matter are supported by the fact that being held in a place or unable to work in the regular jurisdiction is a sudden, temporary circumstance that is not controlled by the subjective intent of the company which it affects. Furthermore, to consider such time spent by employees a PE of their enterprise

184 OECD, "Updated guidance on tax treaties and the impact of COVID-19 crisis", p.3.

185 Paragraphs 28 to 34 of the commentary on Article 5 of the OECD MTC.

186 Paragraphs 12 to 19 of the commentary on Article 5 of the OECD MTC. Special focus on paragraph 18 that explicitly address home office situations, and states that "even though part of the business of an enterprise may be carried ln at a location such as an individual's home office, that should not lead to the automatic conclusion that that location is at the disposal of the enterprise imply because that location is used by an individual (e.g. an employee) who works for the enterprise.".

187 And of paragraph 84 of the commentary on Article 5 of the OECD MTC.

188 Paragraph 98 of the commentary on Article 5 of the OECD MTC. OECD, "Secretariat analysis of tax treaties and the impact of the COVID-19 crisis", p.2 and 3.

would be against the spirit and interpretation of the OECD MTC and its commentaries, in the sense that they explicitly state that even if a part of the business of an company may be carried on at a location such as an individual's home office, that should not lead at the employees home being at the disposal of the enterprise due to that location is used by an employee.[189] Hence, the employee working from home as a result of COVID-19 restrictions, should not create a PE.[190]

Regarding the construction site PE and the scenario addressed under *paragraph h.)*, which concerns the possible creation a PE due to the suspension time of the constructions for reasons relating to the pandemic, this is a scenario already generally included in the definition of construction site PE present in the OECD MTC commentaries, according to the OECD's position.[191] Thus, such situation should not affect the normal application of the DTC provisions or the creation of a PE.[192]

And, additionally, on the other hand, a construction site PE should not be regarded as ceasing to exist when work is temporarily interrupted.

Additionally, under this scenario, another important aspect to consider is how the 12-month threshold of Article 5(3) of the OECD MTC would be applied in these interruptions to follow such guidance. In this regard, a variety of approaches could be applicable, but in light of the OECD MTC Commentaries on Article 5, it seems only the options of treating the two periods of activity (before and after the interruption) separately, as two separate potential PEs, or the option to combine the two periods of activity and the period of inactivity due to the interruption as one potential PE, seem to be possible. However, the approach taken by the OECD in its COVID-19 guidance, suggests that in fact another option should be taken in cases of interruptions due to public health measures, which is combining the two periods of activity without including the interruption period, as one potential PE.[193] In this sense, the OECD compared interruptions due to public health measures with the seasonal and other temporary

189 Paragraph 18 of the commentary on Article 5 of the OECD MTC.

190 OECD, "Secretariat analysis of tax treaties and the impact of the COVID-19 crisis", p.3.

191 Paragraph 55 of the commentary on Article 5 of the OECD MTC.

192 OECD, "Secretariat analysis of tax treaties and the impact of the COVID-19 crisis", p.3.

193 Opinion of H. Pijl in "interruptions in building side permanent establishment to be interpreted under the limited inclusion theory, 67 Bull. Int. Tax 7 (2013), Journal & Opinion Pieces IBFD *Apud* WHEELER, Joanna, "Time in Tax Treaties – Global Tax Treaty Commentaries", in Global Topics IBFD, August 2022, p.7.

interruptions exemption already included under Article 5(3), and suggested "stopping the clock". However, the commentaries do not state if the counting period should or not be interrupted under such scenarios.[194]

Finally, after the above considerations, it is important to conclude that the OECD's view is that DTC provisions, especially the ones of the Articles 4 and 5 were able to successfully solve the situations created as a result of COVID-19 restrictions, without major distortions. Our opinion is that such conclusion only seems to be true on a first level analysis.[195]

However, it is also important to consider that most issues were not a complete novelty at light of the OECD MTC provisions and were/could be solved by the tie breaker rules and by the guidance offered by the commentaries of the MTC. But such solutions would only be the possible for the cases where a DTC existed between the two contracting states, and the individual or legal entity was a tax resident of one or both jurisdictions in cause.

3.4. Specific Guidance Adopted - Selected Jurisdictions

Governments and tax administrations have adopted practical approaches, issued administrative guidelines, and even concluded specific temporary agreements defining how certain rules apply during certain periods affected by the COVID-19 restrictions in place. In this chapter we will analyze the administrative guidance that some national TAs and governments decided (or not) to adopt during the pandemic crisis.

Eleven OECD member jurisdictions, including eight European countries and three non-European countries, were chosen for the study. The selection was based on the availability of administrative guidance, complemented by criteria such as the level of novelty of the administrative guidance adopted in face of the one issued by the OECD, relevant administrative decisions presented by TAs, and the different impacted areas of tax residence that were taken into account when jurisdictions issued guidance (e.g. focus on individuals, legal entities or cross-border workers issues). The objective is to

194 WHEELER, Joanna, "Time in Tax Treaties – Global Tax Treaty Commentaries", p..7.

195 Having into consideration that many situations required, for an appropriate solution, further factual determinations and judgement from the competent tax administrations and authorities, which could have been decided in different ways, we cannot ascertain with absolute sure that there was no major distortion in the allocation of taxing rights in all jurisdictions when applying DTCs residence rules.

understand if it is possible to draw general conclusions from the different approaches, and how they differ from OECD.

i.) France

The French TA issued guidance where it stated that an individual who is temporarily spending time therein and faces a "legal or material impossibility" of returning to their habitual jurisdictions in which they are tax resident, are not considered to have created PEs or to have established tax residence. However, this is only applicable for the time that such impossibility exists.[196] The TA also stated in its guidance that in what concerns the application of DTCs, it appears that the fact that a person who was temporarily retained in France due to a case of major force is not as such, reason for him to be considered to have a permanent home therein, or center of vital interests.[197] They intended to align their interpretation with those of the DTCs and ITL perspective and avoid further uncertainty for taxpayers. Therefore, the lockdowns would have no effect on the residence status of taxpayers under both French national laws and existing DTCs.

ii.) Germany

Germany was the one of the few jurisdictions to address specifically the situation of cross border workers, alongside France, and as such assumes a special relevance in this aspect. It signed specific temporary agreements with neighboring countries to address the tax consequences of lockdowns and restrictions on cross-border workers.[198] Germany's issued guidance was mostly focused on cross-border workers that were unable to perform their employment duties from their usual country of employment, which could lead to tax implications for both employees and employers, and especially due Germany's location, having a total of nine neighboring countries, thus being particularly affected by these scenarios.[199] Germany, had already included in most DTCs with neighboring countries clauses whereby additional home office days would not change the intended distribution

196 République Française, "*Résidence Fiscale et Confinement Crise COVID*", March 2021. Available at https://www.impots.gouv.fr/international-particulier/residence-fiscale-et-confinement-crise-covid

197 *Ibidem.*

198 FALLOIS, Domingo Jesús, "Tax measures adopted due to the COVID-19 emergency. A general overview", p.329.

199 WEBER, Stefan, "Tax and Fiscal Policy Measures in Response to the COVID-19 Crisis – Overview and Economic Analysis for Germany", in Bulletin for International Taxation, IBFD, June 2020, p. 349.

of taxing rights.[200] However, the DTCs celebrated with Austria, Luxembourg, and the Netherlands, provide for a change of taxing rights in the event of an increased number of home office days, and as such Germany concluded special bilateral agreements with the competent authorities of these countries during COVID-19, that contained a mutual agreement based on a temporary and factual fiction.[201] In these agreements, the parties stipulated an exemption from source state taxation concerning the additional days spent working remotely by the non-resident employees. Accordingly, the additional days spent abroad by the non-resident employees working remotely, which were solely due to public health restrictions of the residence state, and which would have not had otherwise been spent would be exempted from taxation in the source state.[202]

Germany's guidance on the PE figure states that a COVID-19 related interruption in construction will not be counted for purposes of the PE time threshold under Article 5(3) of the OECD MTC if (i) the interruption lasts at least two weeks; (ii) the company's personnel has been withdrawn from site, and (iii) the relevant income will be taxed elsewhere if there is no PE in Germany due to the interruption. Germany ignored the time of interruption, but it would combine the time spent before and after the interruption.[203] Additionally, during the pandemic Germany also considered that if an employee temporarily worked from home due to public health restrictions, it typically did not establish a PE of their employer. This perspective remained consistent regardless of the employee's role, their delegated powers or nature of their tasks. Germany understood that given the extraordinary nature of the pandemic, when an employer instructed their employees to operate from a home office, it did not imply that the employer had control over the employee's home workspace.[204]

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200 *Ibidem.*

201 *Ibidem.*

202 VON JAHNICHEN, Maximilian, “Fiscal measures to counteract the economic consequences of the COVID-19 pandemic in Germany”, in Opinio Juris in Comparatione, 2020, p.439 e 440.

203 OECD, “Updated guidance on tax treaties and the impact of COVID-19 crisis”, p.4 and 5.

204 This interpretation was applied to situations that transpired between March 11, 2020, and June 30, 2022. Germany Ministry of Finance, “FAQ “Corona” *Steuern*”, Sections VII and IX, 21 March 2023. Available at https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/2020-04-01-FAQ_Corona_Steuern_Anlage.pdf?__blob=publicationFile&v=38

iii.) Portugal

Portugal did not adopt any instrument in what concerns international tax aspects. As part of the OECD member jurisdictions, Portugal was expected to follow the OECD's view, and as such there are no notable cases of divergence in such matter. Even though special rules where not adopted, other measures regarding social security contributions and tax payments were adopted, without however affecting the tax residence in Portugal.[205]

iv.) Spain

The case of Spain adopts a particular relevance, especially concerning its interpretation related to tax residency, which initially deviated from the OECD's recommendations. The country considered the number of days an individual spent in its territory for determining tax residence even if the stay was pandemic-induced and against the individual's intent. The first ruling in June 2020[206] highlighted this. It concerned a Lebanese citizen which had travelled to Spain and due to the restrictions in place at the time was unable to return to his habitual tax jurisdiction, and as such by spending over 183 days in Spain, the TA considered that the criterion for the establishment of tax resident was fulfilled. Therefore, it seemed that the Spanish TA disregarded the OECD's guidance and adopted their own interpretation, which is possible since the guidance has a soft law value. Notably, there was no DTC in place between Lebanon and Spain, and as such no importance is attributable to the tiebreaker rules usually present in the DTC.

Nevertheless, this decision raised concerns among other foreign individuals also stranded in Spain at the time, because of COVID-19 related reasons, even if a DTC existed in their home countries. However, the TA subsequent rulings in 2021[207] on the COVID-19 impacts on ITL provisions showed a shift towards the OECD's guidance. One

205 NOGUEIRA, João Félix Pinto, "Tax reactions to the SARS-CoV-2/COVID-19 Pandemic in Portugal", in Europe PMC, 2021. Available at https://europepmc.org/Article/ppr/ppr281389

206 Dirección General de Tributos, decision no. V1983-20, 17/06/2020. Available at https://petete.tributos.hacienda.gob.es/consultas/?num_consulta=V1983-20

207 Another decision provided in the same matter was the tax ruling no. V2337-21. Dirección General de Tributos, decision no. V2337-21, 18/08/2021. Available at https://petete.tributos.hacienda.gob.es/consultas/?num_consulta=V2337-21

of such rulings[208] involved another foreigner who travelled to Spain and due to the public health restrictions spent more time therein that intended. In this case the TA opted for a different approach, referencing to the OECD's guidance on the issue, and evaluated not only the time spent in its territory but also other pertinent criteria. The distinguish factor for this change in approach was the existence of a DTC between Spain and the individual's home country, Morocco, which allows the application of tiebreaker rules.

Additionally, the Spanish TA's evolving interpretation extended to the potential establishment of PEs. A notable 2022 ruling[209] concerning a business travel to Spain of an employee of an UK established company extended in a way that put at risk the creating of a PE therein, especially since such employee was part of the key management of the enterprise. Even though the individual had no authority to sign contracts on the company's behalf and had a residence in Spain due to frequent travels, the Spanish TA, referencing the OECD's guidelines, determined that there was no PE. They emphasized the lack of permanency and the fact that the employee's home office was not at the company's disposal.

v.) Denmark

Regarding Denmark's position on tax residency during COVID-19, it will be relevant to highlight the Danish TA's decision in regards of employees working remotely and the possible creation of PEs.[210] This scenario involved a German company request to the Danish TA for clarifications on whether an employee who was working remotely from Denmark constituted the creation of a PE of the company therein. The employee started working remotely during COVID, but the company decided that afterwards he would not be required to return to the office in Germany and could continue to work remotely from Denmark. The company had no other operations in Denmark, and the employee held no managerial powers. The Danish TA decided that the employee's presence in Denmark would not constitute a PE of the employer, even if the home office situation persisted

208 Dirección General de Tributos, decision no. V0862-21, 13/04/2021. Available at https://petete.tributos.hacienda.gob.es/consultas/?num_consulta=V0862-21

209 Dirección General de Tributos, decision no. V0066-22, 18/01/2022. Available at https://petete.tributos.hacienda.gob.es/consultas/?num_consulta=V0066-22

210 Danish Tax Agency and Tax Council, Decision no. SKM2021.539.SR, Case no. 21-0516496, of 28 September of 2021. Available at https://skat.dk/data.aspx?oid=2344031&lang=da&chk=217943.

post-pandemic. The TA emphasized that a PE would only be established if the conditions outlined in the DTC between the concerned countries were met. Specifically, there must be a fixed place of business, and the company carried wholly or partly its activities through that fixed place of business. The TA considered that in this scenario there was no fixed place of business, since the presence of the employee is mainly due to its "personal interests and not the company's business interest"[211], and in such scenario the home office does not constitute a fixed place of business that is at the employer's availability.[212]

This scenario and decision highlight the position taken by Denmark in face of home office situations whereby employee's working from a different jurisdiction would not in the opinion of the Danish TA, thereby create a PE of the foreign company if a PE did not already exist.[213] The rational is that for a location to constitute a fixed place of business, the employee's work for the company takes place continuously and be of a long-term nature. And in cases that working from home does take place in such terms, it is also important to take in consideration if there is a business advantage for the employer, which was not verifiable in this scenario.

vi.) Sweden

Sweden's position is particularly important on two aspects. The first concerns the shift in the criteria used by this jurisdiction to determine when home-office situations give rise to PEs of foreign companies. Before May 2020, Sweden's position since 2015 was that employees working from home would create for a foreign company a PE therein, which was a perspective not aligned with the 2017 OECD MTC commentaries on Article 5. And, as a result of new situations coming into light, and since during COVID-19

211 *Ibidem.*

212 Furthermore, the TA also considered that the employee's duties were of an auxiliary and preparatory nature.

213 Danish Tax Agency, control signal no. SKM2020.298.SKTST – COVID-19 clarification of practice regarding permanent establishment, seat of management, tax residence of natural persons and taxation of wage income for nature persons working in several countries, of 3 July of 2020. Available at https://skat.dk/data.aspx?oid=2296858. This guidance clarifies how the global outbreak of COVID-19 affected Denmark's interpretation of double taxation agreements in relation to PEs, tax residence of individuals and income from employment of employees who worked in several countries. In this note the Danish TA explicitly refers to the guidance issued by OECD on April 3rd, thereby agreeing, and following the OECD's position in the country.

situations of home offices were more frequent, concerns and pressure arose regarding this policy[214] and its need to be updated and adapted.

Responding to this, the TA issued a revised policy[215] in May 2020. This guidance, while influenced by the pandemic, was not exclusively for application during such period. The primary determinant became whether there is an explicit requirement for the employee to work from home and provides several examples of such scenarios. The new criteria focuses on whether the company has a place at its disposal, which could be the home office of an employee, if the work from home is strictly due to regulatory restrictions such as the public health measures adopted during COVID-19, but also considers the employee's wishes, which could mean that remote-working represents no commercial interest for the company, and as such is not at its disposal, but is instead based on the employee's own interests.[216]

The second noteworthy position that Sweden took concerns individuals and the days spent for computation of the 183 days physical presence tax residence test. Hence, Sweden took a path different from the OECD guidelines. According to the guidance

214 The Swedish TA prior stringent policy was that if a foreign employer did not offer a space for the Swedish employee to work, and if the employee regularly worked from home, the circumstance amounted to an implied agreement of work from home. Therefore, the home office was often regarded as at the disposal of the employer and a fixed place of business that created a PE. The same would still be applicable even if the employee had a place of work in Sweden for the employee, but work was still regularly performed from a home office. Hence, it was challenging to avoid having a PE therein. Swedish Tax Agency (Skatteverket)," Rules and positions: when does an employee's work at home result in a foreign company having a permanent establishment?", 16/03/2015. Available at https://www4.skatteverket.se/rattsligvagledning/337845.html?date=2015-03-16

215 Swedish Tax Agency (Skatteverket), "Rules and Positions: When does an employee's work from home result in a foreign company having a permanent establishment?", 13/05/2022. Available at https://www4.skatteverket.se/rattsligvagledning/411692.html?date=2022-05-13

216 Now with this new position the mere fact that the employer is not providing the employee with a place of work from is not enough to conclude an unspoken agreement that the home of the employee is at the disposal of the employer. If no company advantage or business interest in the activity being performed in Sweden, home office work at the request of the employee should not itself generate a PE. Swedish Tax Agency (Skatteverket)," Rules and positions: when does an employee's work at home result in a foreign company having a permanent establishment?", 16/03/2015. Available at https://www4.skatteverket.se/rattsligvagledning/337845.html?date=2015-03-16

issued by this jurisdiction[217] if an individual was staying in Sweden for more than six months, even if due to COVID-19 restrictions, they could be liable for tax on their worldwide income and considered a tax resident therein. They explicitly state that it doesn't matter that the individuals originally had no intention of staying such longer period in the country, their stay could still mean that they will be permanently there, and as such will be subject to unlimited tax liability. However, the guidelines also reflect that in cases where DTC applies, and an individual is still liable for unlimited tax in their country of residence according to a DTC, the fact that an individual is temporarily staying in Sweden due to public health measures, tax residence will not change in principle. However, this may not be the scenario under all DTCs, as if the 183 days rule applies and it is fulfilled, then Sweden is also considered a country of residence of the individual and dual residence issues must be solved by the other jurisdiction. In short, Sweden applies the DTC rules as it would normally have, having no regard to the COVID-19 pandemic situation.

vii.) Australia

During COVID-19 Australia determined that for foreign incorporated companies, in what concerned the central management and control criteria, if the enterprises were holding board meetings or the directors were attending from Australia, this alone would not alter the company's residence status.

Regarding the creation of PEs, the Australian TA established that COVID-19 impacts alone would not result in having an Australian PE unless certain requirements were met Specifically, the company must not have a PE therein before the pandemic; there should not be any further changes that justify the creation of a PE; and the unplanned presence of employees in Australia is the short-term result of being temporarily relocated or restricted from travel.[218] The TA explicitly mentioned that during the pandemic the restrictions put in place resulted in having many employees present in the state when they would have ordinarily been located outside this given state, and while temporal permanence remained a question of fact and degree, the extraordinary circumstances of

217 Swedish Tax Agency (Skatteverket), "Answers to common questions – Corona". Available at https://skatteverket.se/4.1c68351d170ce554527c42.html

218 ATO, "International tax for business", 24 Jun 2022. Available at https://www.ato.gov.au/business/international-tax-for-business/working-out-your-residency/

the COVID-19 crisis presented situations where the TA considered force presence over 6 months to be temporary.[219]

In what concerns the approach taken regarding individuals tax residence status, the Australian TA also did not consider tax residents foreigners who usually live in other states permanently, and that intended to return there as soon as able. Nonetheless if these conditions are not fulfilled an individual could be considered a tax resident therein. Thus, Australia during COVID-19 considered facts and circumstances and not only the number of days spent in its territory, namely the intention and purpose of coming or remaining therein, the living arrangements while there, family and business ties to its territory.[220] Additionally, the TA issued guidance regarding its tax residents that were temporarily relocated in other states, confirming that if an individual usually lives and works in Australia, even if relocated temporarily in other jurisdiction, their tax obligation does not change, and if they are required to pay a foreign income tax, it will reduce the Australian tax payable.[221]

viii.) Canada

The Canadian TA approach to COVID-19's impacts on tax residency and other international tax matters are relevant in the sense that it made an important distinction not seen in other countries COVID-19 related clarifications. Canada released a package of administrative guidance pertaining to several significant international tax issues caused by COVID-19 public health restrictions on June 2020.[222] In this guidance the TA emphasized that for foreign enterprises, that prior to the public health restrictions, were residents in a foreign jurisdictions for tax purposes, the mere attendance of a board meeting, by one or more directors, from Canada, would not alone be sufficient to establish

219 Taxation Ruling, TR 2002/5, 12 May 2021 (consolidated ruling and addendum). Available at https://www.ato.gov.au/law/view/document?docid=TXR/TR20025/NAT/ATO/00001&PiT=2021051200 0001

220 ATO, "COVID-19: Residency and source of income", 10 Aug 2021. Available at https://www.ato.gov.au/General/COVID-19/Support-for-individuals-and-employees/Residency-and-source-of-income/%23ChangeoftaxresidencyduetoCOVID19#ChangeoftaxresidencyduetoCOVID19

221 *Ibidem.*

222 Government of Canada, "International income tax issues: CRA and COVID-19", June 2020. Available at https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/guidance-international-income-tax-issues-covid.html#h_1

tax residence in Canada. The novelty of the clarification resides in the fact that this only applies in situations when there was no tiebreaker rule in favor of the place of incorporation in the DTC applicable. On the other hand, if a DTC did not exist between the countries, this administrative guidance would not be applicable automatically and would require a case-by-case consideration. However, the TA does not explain in this clarification the reason of such distinction, although it might be due to "inappropriate tax avoidance associated with non-treaty countries".[223]

Furthermore, the TA suggested and advised in this guidance that all taxpayers should document any relevant circumstances and not rely solely on the automatic applicability of this guidance, since it has a mere administrative value and does not intend to expand existing policies and rules.[224] Taxpayers should, as such, take measures to avoid the central management and control tax residency test which could lead to adverse tax consequences, and as such should include information in the board meeting minutes and statements indicating the travel restrictions and the directors present abroad, and when possible, such directors should also abstain from voting or delegate such responsibility.

Additionally, in what regards individuals, the TA stated that individuals who were solely in Canada due to the public health restrictions in place, they would not automatically meat the residence criteria, and the days spent there would not count for the 183 days residency test, if they are typically leaved in other jurisdictions and intended to return there as soon as possible.[225] In what regards legal entities, nonresidents would not be seen as having a PE therein merely because their employees worked from Canada due to such restrictions Similarly, no "agency" PE will be assumed if a dependent agent in Canada signed contracts for a non-resident entity during this period, provided these actions were strictly a result of the travel restrictions.[226]

223 ANDERSON, Brett, BESWICK, Byron, "Overview of Canadian Fiscal and Tax Administrative Measures in Response to the COVID-19 Pandemic", in Bulletin for International Taxation, August 2020, p. 461.

224 *Idem,* p. 464.

225 Government of Canada, "International income tax issues: CRA and COVID-19", December 2021. Available at https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/guidance-international-income-tax-issues-covid.html

226 *Ibidem.*

ix.) Ireland

Ireland adopted on March 2020 guidance[227] on the effects of COVID-19 on the tax residence of individuals. It intended to assist individuals who were restricted from moving from Ireland in the context of the pandemic and consequent confinements. And as such, these situations would be considered a "force majeure circumstance" for the purposes of establishing individuals' tax residence. Nonetheless, this guidance was further updated in 2021[228], and the above-mentioned criteria would only be applicable if the restrictions have limited the intention of the individuals to departure from that state, and as such certain conditions needed to be met. Namely the individual had COVID-19 or any members of his family, or partners with whom he has been travelling; the individual had been quarantined or self-isolating due to suspects of the disease; received medical advice not to travel, employer request not to travel; and border controls of entry restrictions in home country or non-availability of commercial flights. In addition, it is mandatory that the individual must have left the state as soon as reasonably possible, which would have been on or by 1 June 2020. If departure did not occur by this date "force majeure circumstance" would not apply to any of the days spent.[229] Therefore, in this line, Ireland's issued guidance is to disregard the presence of an individual in Ireland, and where relevant, in another jurisdiction, for a company in relation to which the individual is a director, if such presence is shown to result from travel restrictions related to COVID-19.[230]

Additionally, relief for transborder workers was expanded to include situations where, due to COVID-19, employees have to work from home in that state.[231]

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227 Revenue, Irish Tax and Customs, "Provisions relating to residence of individuals", Part 34-00-01, September 2021. Available at https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-34/34-00-01.pdf

228 *Ibidem.*

229 *Ibidem.*

230 OECD, Secretariat analysis of tax treaties and the impact of the COVID-19 crisis, in OECD, 3 April 2020, p.4. Available at https://www.oecd.org/coronavirus/policy-responses/oecd-secretariat-analysis-of-tax-treaties-and-the-impact-of-the-covid-19-crisis-947dcb01/

231 Revenue, Irish Tax and Customs, "Remote working relief", Part 05-02-13, May 2023. Available at https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-05/05-02-13.pdf Revenue, Irish Tax and Customs, "Transborder workers relief", Part 34-00-06, March 2022. Available at https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-34/34-00-06.pdf

x.) United States

The US approach in what concerns the figure of PE was that an “affected person”[232] will not be subject to tax therein since it will not be considered to have established a PE even if it performed services, or other activities temporarily in the US, if provided that such activities would have not been taken place therein if it wasn’t for the interruption caused by the COVID-19 crisis.[233] Furthermore, it also considered that due to the exceptional and temporary circumstances caused by COVID-19, individuals who did not anticipate to meet the substantial presence test to become residents of the US for income tax purposes would not be considered tax residents. However, this would only be applicable to individuals who are lawful permanent residents and who meet the substantial presence test.[234]

xi.) United Kingdom

The UK enacted special measures to be put in place regarding tax residence during the pandemic, namely that the days spent in the UK between the 1st of March of 2020 and 1st June of 2020 would not count towards the computation of the term in what regards the establishment of tax residence of individuals for specific reasons connected with COVID-19.[235] This was known as an exceptional circumstance under the statutory residence test established in the UK. The TA's perspective aligns with the OECD guidance and several conditions like quarantines, travel restrictions due to official advice, border closures or

232 Term used in the US legislation and guidance issued during the pandemic to refer to individuals who are affected by the restrictions put in place, such as border controls, confinements, unavailability of commercial flights and or affected by COVID-19. IRS, “FAQs for Nonresident Alien Individuals and Foreign Businesses with employees or agents impacted by COVID-19 Emergency travel disruptions”, 28 March 2022. Available at https://www.irs.gov/newsroom/faqs-for-nonresident-alien-individuals-and-foreign-businesses-with-employees-or-agents-impacted-by-covid-19-emergency-travel-disruptions

233 *Ibidem.*

234 IRS, Administrative, Procedural, and Miscellaneous, 2020. Available at https://www.irs.gov/pub/irs-drop/rp-20-20.pdf

235 HM Revenue & Customs, “HMRC internal manual – Residence, Domicile and Remittance Basis Manual”, RDRM13410 - Residence: The SRT: Annex D: International tax clarifications due to coronavirus (COVID 19) Q&A. Available athttps://www.gov.uk/hmrc-internal-manuals/residence-domicile-and-remittance-basis/rdrm13410

employer directives are acknowledged as exceptional for tax residence purposes.[236] Hence, for COVID-19-related reasons, the provisions imposed permitted non-UK residents to be physically present therein without jeopardizing their prior residence status. Additionally, the UK also enacted rules regarding the employment in the state and overseas to discount days where an individual was on “emergency leave” due to COVID-19.

Furthermore, the UK did not consider that nonresident companies would automatically have a taxable presence by way of PEs after short periods of time, and that such creation of PE is subject to a level of fact and degree, and habituality conditions need to be met. [237] Regarding the tax residence of directors or employees, the TA did not adopt special measures and considered that the current framework already provided flexibility for situations such as COVID-19, and just because some board meeting are held here, or because some decision are taken in this country in a short period of time a company will not necessarily become resident therein.[238] The TA is aware that while the site of board meeting may be important for the central management and control test, it is not determinative, and it is always base on facts and circumstances which considered the forced changed in response to COVID-19. Furthermore, they will still consider the DTC tie breaker rules in case of dual residency issues.

3.5. Concluding Summary

In this chapter, we present the findings from our analysis of the OECD's COVID-19 guidance and the administrative guidance issued by the selected jurisdictions. Our research sought to answer key questions posed in this dissertation. Specifically, we explored whether most jurisdictions generally adhered to the OECD's guidance on

236 HM Revenue & Customs, “HMRC internal manual – Residence, Domicile and Remittance Basis Manual”, RDRM11005 - Residence: The Statutory Residence Test (SRT): Main contents: Coronavirus (COVID-19). Available at https://www.gov.uk/hmrc-internal-manuals/residence-domicile-and-remittance-basis/rdrm11005

237 HM Revenue & Customs, “HMRC internal manual – International Manual”, INTM261010 - HMRC Approach to UK Permanent Establishments in response to COVID-19 Pandemic. Available at https://www.gov.uk/hmrc-internal-manuals/international-manual/intm261010

238 HM Revenue & Customs, “HMRC internal manual – International Manual”, INTM120185 - HMRC Approach to Company Residence in response to COVID-19 Pandemichttps://www.gov.uk/hmrc-internal-manuals/international-manual/intm120185

interpreting DTC provisions during COVID-19 and how this was implemented in the selected jurisdictions we analyzed.

In our analysis, we found that most jurisdictions followed the OECD's non-binding guidance concerning COVID-19. While many member jurisdictions displayed similar approaches, the means to achieve such outcomes varied.

One approach used to mitigate the impacts of COVID-19 restrictions on tax residency rules for individuals and legal entities was the temporary "suspension" of these rules. The OECD updated guidance also referred to this as "stopping the clock" for determining whether thresholds have been met during periods affected by public health measures.[239] For instance, the US and the UK adopted this, allowing individuals and legal entities to maintain their previous residency status during specific periods affected by the public health measures, and where the thresholds contained in the rules for establishing tax residency and creating PEs would not be applicable. However, most jurisdictions such as Australia, Ireland, and France, decided that such "suspension" should be dependent on specific criteria and requirements, tailored to the extraordinary circumstances of the pandemic. Hence, these jurisdictions would only "stop the clock" if certain additional requirements related to the intention and purpose of stays in the country were met. They considered factors such as individuals' intention to leave and the physical or legal impossibility of doing so during certain periods.

While the "stopping the clock" approach aimed to address distortions in tax residency and PE rules, it also introduced the potential for abuse and non-taxation situations when attempting to prevent instances of double taxation. Such potential undesirable effects explain the need for additional controls and requirements, as enforced by most jurisdictions.

It is worth noting that the OECD guidance, although persuasive, is not binding, and it is only one possible interpretation. And as such, some OECD member jurisdictions did in fact adopt different interpretations of the pertinent national tax laws and tax treaty clauses and dealt with the issues arising from COVID-19 pandemic in a different manner than the OECD and of most OECD member jurisdictions, in a certain scenario.

239 OECD, Updated guidance on tax treaties and the impact of the COVID-19 pandemic, 21 January 2021. Available at https://www.oecd.org/coronavirus/policy-responses/updated-guidance-on-tax-treaties-and-the-impact-of-the-covid-19-pandemic-df42be07/#snotes-d4e103

For example, Sweden did not consider the intention or purposes of prolonged stays of individuals when determining tax residency. Instead, individuals spending more than 183 days therein would be considered tax residents. This would then be resolved through the pertinent treaty clauses, such as the tiebreaker rules for cases of dual residency, when a DTC was in place.

This position also highlights that some jurisdictions did not adopt any special interpretation or criteria, nor extended the application/interpretations of administrative guidance issued during COVID-19, when determining tax residence of individuals or legal entities when no DTC was in place. Spain, similarly, did not adopt any special interpretation or criteria, nor did it extend the application or interpretations of administrative guidance during COVID when determining tax residence in the absence of a DTC. Canada, on the other hand, explicitly stated in its administrative guidance that COVID-19 interpretations could be applicable even without a DTC[240], by meeting further requirements such as including relevant information in the board meeting minutes and statements indicating travel restrictions and the presence of directors abroad.

Regarding the creation of PEs, some jurisdictions like the UK and Denmark placed a greater emphasis on the long-term nature, continuity, and the reasons for the creation of PEs resulting from home office situations. Additionally, further attention was also paid during such time to the business's own interest in a jurisdiction or the personal and subjective interests of the employee, which were adopted not only during such time, but as mentioned in Denmark's guidance, will be assumed moving forward, if such arrangements continue post-pandemic, acknowledging the permanent reality of remote working dynamics.

In this sense, it is noteworthy to mention countries like Denmark and Australia relied on intention as a criterion for establishing tax residency and determining the creation of PEs during the COVID-19 pandemic. This deviation from the traditional, objective criteria outlined in Articles 4 and 5 of the OECD MTC, indicates a shift

240 The documental and abstention from voting requirements, namely to include information on the board meeting minutes and statements of the travel restrictions and directors abroad, and when possible, such directors should also abstain from voting or delegate such responsibility, would be applicable in cases where no DTC was in place but also when a DTC was in place but did not have as a tiebreaker rule for cases of dual residence of legal entities the place of incorporation. Government of Canada, "International income tax issues: CRA and COVID-19", June 2020. Available at https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/guidance-international-income-tax-issues-covid.html#h_1

towards subjective factors. Hence, the criterions of the OECD MTC were somewhat overshadowed by the consideration of individuals and legal entities intentions and interests. The established criteria in DTCs are based on objective and verifiable factors such as physical presence, the availability of a permanent home, family, and business ties, providing a clear and more standardized framework for determining tax obligations. However, during the pandemic there was a notable emphasis on individuals' intentions and will in these matters. This subjective criterion introduces a level of uncertainty and opens the door for potential abuses.[241] Verifying an individual's intention can be challenging, as it can be easily changed, especially when tax benefits are associated with it.[242] By prioritizing objective factors outlined in DTC, the risk of abuse is somewhat minimized, and a fair and consistent approach is maintained. Therefore, it is important to recognize the potential drawbacks of relying solely or heavily on intention and subjective factors for tax purposes. By giving precedence to objective and verifiable criteria as outlined in DTCs, a more transparent and fair system can be maintained, ensuring that tax obligations are determined consistently and minimizing the risk of abuse.

Finally, in what regards the impact of COVID-19 on cross-border workers, this issue received special attention from some jurisdictions, such as France and Germany. These jurisdictions reached agreements to address the impact on cross-border employees in relation to DTC provisions, while others focused primarily, as seen above, on how domestic laws pertaining tax residence rules, and residence tests should apply, often ignoring the extraordinary physical presence of individuals due to public health measures.

Table 2: Comparative Table

241 Subjective criteria, such as individuals interests and intentions, are more susceptible to manipulation and abuse, taxpayers may alter their intentions or provide misleading information to take advantage of favorable tax treatments in certain jurisdictions. Therefore, this can undermine the integrity of the tax system and result in tax avoidance or evasion.

242 Assessing individuals' intentions can be challenging and a time-consuming process for tax authorities as it may require additional resources, expertise, and potential disputes between taxpayers and tax authorities, leading to an increased administrative burden and costs for both parties.

Issue	France	Germany	Portugal	Spain	Denmark	Sweden	Australia	Canada	Ireland	US	UK
Were days spent for COVID-19 reasons counted for individuals tax residency	No	Unaddressed	Unaddressed	Yes	Unaddressed	Yes	No	No	No	No	No
Were days spent for COVID-19 reasons counted for	No	No	Unaddressed	Yes	Yes	No	No	No	Unaddressed	No	No

Issue	France	Germany	Portugal	Spain	Denmark	Sweden	Australia	Canada	Ireland	US	UK
creation of a PE											
Relevant measures applied for legal entities	No	Unaddressed	Unaddressed	No	No	No	Yes. Tax residence remains unaffected by board meetings or directors presence	Yes. Directors' presence alone does not alter tax residence for companies previously based elsewhere	Yes. COVID-19 related travel limitations exempt director presence for tax residence considerations	No	No
Relevant measures applied for cross-border workers	Yes. Bilateral agreements celebrated	Yes. Bilateral agreements celebrated	No	No	No	No	No	Yes. The 183 days test will not apply to individuals	Yes. Employees required to work from home are eligible for	Yes. "Affected persons"	Yes. "Emergency leave" due to COVID-19 applied to employment

Issue	France	Germany	Portugal	Spain	Denmark	Sweden	Australia	Canada	Ireland	US	UK
								working therein exclusively due to travel restrictions	"transborder workers relief" due to "force majeure" circumstances	exemption	in the state and overseas to discount days
Specific Exceptions applied	Yes. Legal or material impossibility of returning to habitual residence jurisdiction requirement	Yes. Additional days worked remotely by the non-resident workers due to COVID-19 are exempted	No	No	No	No	No	No	Yes. Force majeure circumstance applies if the individual (i) had COVID-19 or any family members/partners travelling with them; (ii) was	Yes. Affected persons exception applies to those impacted by COVID-19	Yes. Statutory residence test exceptional circumstance applies if individuals: (i) were quarantined or advised by a health professional/public health guidance to

Issue	France	Germany	Portugal	Spain	Denmark	Sweden	Australia	Canada	Ireland	US	UK
		from source state taxation under the agreements							quarantined or self-isolated due to suspects of the disease; (iii) received medical advice not to travel; (iv) employer request not to travel; (v) faced border entry restrictions or non-availability of commercial flights	restrictions	self-isolate in the country; (ii) received official Government advice not to travel from the country; (iii) unable to leave due to closure of international borders, or (iv) asked by employers to return to the country temporarily

Issue	France	Germany	Portugal	Spain	Denmark	Sweden	Australia	Canada	Ireland	US	UK
Additional requirements	No.	Yes. The OECD MTC PE time requirement does not apply to COVID-19 related interruption of construction sites as long as: (i) the interruption lasted for at	No	No	Yes. Additional criteria for PE determination, namely employee's wishes and/or commercial interest for the company in home office setups	Yes. Additional criteria for PE determination, namely employee's wishes and commercial interest for the company in home office setups	Yes. Presence in the country would not count for PE purposes if (i) the foreign company did not have a PE there before; (ii) no other	Yes. Exclude directors' presence from the central management and control test, if there was no tiebreaker rule in favor of the place of incorporation, and documenta	No	No	No

Issue	France	Germany	Portugal	Spain	Denmark	Sweden	Australia	Canada	Ireland	US	UK
		least two weeks; (ii) personnel are removed from the site; (iii) the relevant income will be taxed in another jurisdiction					changes to the company's situation that justify a PE, and (iii) the employee's unforeseen presence is temporary	tion requirements apply			
Time limit applicable	Yes	Yes	No	No	No. Determination of a PE	No. Exception made for	Yes	Yes	Yes	Yes	Yes

Issue	France	Germany	Portugal	Spain	Denmark	Sweden	Australia	Canada	Ireland	US	UK
for the measures adopted					based also on the business's own interest in a jurisdiction or the personal and subjective interests of the employee, will be assumed moving forward	COVID-19 was made under regulatory restrictions that force the employee to work remotely and being applicable in the future					

Issue	France	Germany	Portugal	Spain	Denmark	Sweden	Australia	Canada	Ireland	US	UK
Stopping the clock approach	Yes	No	No	No	No	No	Yes	Yes	Yes	Yes	Yes
Approach in face of OECD guidance	Similar	Evolution towards the guidance	Unaddressed	Evolution towards the guidance	Evolution towards the guidance	Different	Similar	Similar	Similar	Similar	Similar

Chapter IV – Conclusion

4.1. Summary of Findings

This dissertation had as a *prima facie* purpose to analyze and address the impacts of the pandemic in relation to the criteria set out in the OECD MTC for the establishment of the tax residence for both individuals and legal entities. Since the pandemic crisis created an interesting and unprecedented debate in international taxation regarding the application of tax residence rules, and as a result of the undeniable relevance of the concept of tax residence, there was a need to further research the modifications occurred in this field.

i.) Understanding tax residence and ITL pre-COVID-19

To get a better understanding of the concepts at play, in the second chapter we delved into the foundation of ITL, offering relevant definitions, concepts, and an overview of the current international and EU tax law framework. Additionally, we also analyzed national tax residency laws in a group of selected jurisdictions. The study was focused on the OECD MTC, illustrating its efforts to prevent double taxation by establishing a system of shared taxing rights between the residence state and the source state.

Throughout this research, we have highlighted the significance of tax residence as a cornerstone in ITL. Our findings indicate that most jurisdictions adopt residence as the principal criterion for tax claims, with taxation based on residence serving as the primary rule for taxing income and capital at both national and international levels. Tax residence is ascertained by various factors, including physical presence, housing availability, economic connections, and the exercise of economic activities. The definitions of tax residency, however, differ across countries, with each state having specific rules for individuals and legal entities. For individuals, common methods for determining tax residence include the physical presence test and an analysis of social and economic circumstances. In contrast, legal entities' tax residency is typically determined by factors such as place of incorporation or registry and location of central management and control.

It is important to acknowledge that the varying definitions of tax residency can result in individuals potentially being considered tax residents in multiple countries simultaneously. The OECD MTC addresses this issue by utilizing tax residence as a general clause to distribute taxing rights based on each contracting state's definition of a resident, considering additional factors such as the main place of residence and family relationships.

In summary, this dissertation has shed light on the crucial role of tax residence in international taxation. Understanding the concept and its application is essential for determining tax liabilities and the allocation of taxing rights between countries. Therefore, the findings of this second chapter contribute to the existing body of knowledge in ITL.

ii.) Analyzing the impact of COVID-19: OECD guidance and jurisdictional responses

In the third chapter, to address the main research questions posed in this dissertation, we examined the OECD's COVID-19 guidance, as well as the administrative guidance adopted by eleven jurisdictions, including the position of three non-European countries, in what regards the challenges imposed by the COVID-19 crisis on tax residence and ITL rules.

In essence, in this third chapter, the analysis of the OECD's COVID-19 guidance reveals that it held the view that the existing DTC provisions, which followed the OECD MTC, were adequate and sufficient in addressing the challenges posed by the pandemic without major distortions. They stated that most COVID-19 related issues were not a novel and could be resolved through the application of the tiebreaker rules and the guidance provided in the OECD MTC commentaries.

Regarding the positions assumed by the selected jurisdictions, most countries recognized the need to adopt practical approaches and to issue further COVID-19 guidelines. A few even entered into temporary bilateral agreements with other countries to define the application of tax residency and PE rules during this exceptional period. Despite the non-binding nature of the OECD's guidance for member jurisdictions, the analyzed countries largely followed its recommendations.

The jurisdictions aligned with the OECD's guidance primarily in terms of the effects of the application, aiming to disregard the extraordinary physical presence of both individuals and companies in foreign jurisdictions. However, the means employed to achieve this varied. Some opted for the suspension of the computation of the term for tax residency purposes, employing a "stopping the clock" approach, while others introduced additional requirements, such as considering the intention and purpose of the stay during relevant periods.

Overall, the findings highlighted the importance placed on addressing the tax implications of the pandemic and the efforts made by jurisdictions to mitigate the potential disruptions caused by COVID-19. While following the OECD's guidance, jurisdictions implemented their own measures to accommodate the exceptional circumstances demonstrating the need of adapting existing rules to realities of the pandemic. However, a deeper analysis of the OECD's position leads to the fact that the initial belief that the current OECD MTC rules and commentaries adequately addressed the impact of the COVID-19 pandemic on DTCs without significant distortions is not entirely accurate and there appear to be unnoticed limitations.

iii.) Limitations of the OECD's approach

The need for additional measures such as reference to resource to MAP[243] and the issuance of additional administrative guidance by multiple jurisdictions to mitigate impacts of COVID-19 on ITL, highlights the fact that national TAs had to resort to extra resources and procedures to achieve the OECD's view of no major distortions in the allocation of taxing rights would arise as a result of COVID-19.[244] Additionally, it seems the potential negative effects stemming from the OECD's recommendations were overlooked.

During the pandemic, competent TAs ended up having a considerable degree of flexibility in applying DTC rules, leading to potential differences in standards and interpretations applied. This flexibility combined with the unique circumstances brought about by the pandemic, led to variations in how tax conflicts were handled among jurisdictions. Consequently, it reveals that the existing OECD MTC provisions and commentaries appeared insufficient in guiding these unprecedented situations.

243 Mechanism provided by DTC to resolve disputes and conflicts between the tax authorities of different countries.

244 This is noted in the OECD's guidance where it states: "Exceptional circumstances call for an exceptional level of coordination between jurisdictions to mitigate the compliance and administrative costs for employees and employers associated with an involuntary and temporary change of the place where employment is performed. Where relevant, MAP should be applied efficiently and pragmatically to help resolve issues arising out of the COVID-19 pandemic.". OECD, "Updated guidance on tax treaties and the impact of COVID-19 crisis", 21 January 2021, paragraph 62.

The increasing reliance on the MAP process highlighted the need for resolution mechanisms to tackle complex conflicts arising from the pandemic, as a result of travel restrictions and changes in the concept of tax residency. These situations not explicitly covered in existing DTC forced TAs into navigate these uncharted territories, potentially resulting in variations in how they interpreted and applied tax law rules.

This disparity suggests that the guidance set out in the OECD's COVID-19 guidance, and in the OECD MTC did not comprehensively address all the issues arising from unique circumstances. This lack of clear guidance may have allowed for a greater discretion in interpreting and applying the DTC rules, leading to potential variations among countries.

Excessive reliance on MAP could have led to inconsistent treatment of taxpayers due to the application of potential different standards among countries. As well as taxpayers operating in multiple jurisdictions may have also faced challenges in understanding and complying with varying interpretations and applications of tax rules. This inconsistency can create uncertainty, increase compliance costs, and potentially result in double taxation or non-taxation, and an elevated risk of disputes between taxpayers and TAs. Consistency and predictability are crucial for maintaining trust and cooperation among countries in the field of taxation. If taxpayers perceive that TAs are applying rules in an arbitrary or inconsistent manner, it can erode trust in the international tax system.

In sum, while the existing OECD MTC rules and commentaries offered a foundation for addressing the pandemic's impact on DTCs, they were not fully equipped to handle unique challenges posed by COVID-19. Therefore, the pandemic did affect DTC rules and applications and it was not always solved through the existing OECD MTC rules and commentaries without distortions, given the space for the application of different standards, through MAP where less guidance on how states deal with situations exists.

Additionally, the pandemic compelled jurisdictions worldwide to employ additional administrative guidance to handle tax residency repercussions. Despite the OECD providing guidance on this matter, most jurisdictions have chosen to develop their own guidelines at the administrative level. These guidelines have been primarily issued by national tax offices and TAs through legal instruments issued a mere administrative level. In practice, some countries have replicated the OECD's guidance at the national level, while others have added further clarifications or adopted their own perspective on the effects and solutions related to tax residency during the pandemic, diverging in some cases from current DTC provisions (and consequently, from the OECD's view) and national tax laws, as seen. However, this latest approach has led to unintended consequences as administrative guidance has been applied instead of domestic tax laws and relevant DTC provisions. For instance, certain jurisdictions introduced the "stopping the clock" approaches, or additional requirements for the application of DTC rules, effectively replacing them with administrative guidance for specific periods of time. By doing so, they unintentionally have admitted that new exceptions could be made, particularly regarding the 183 days residency test, when extraordinary circumstances are at play, without previously embedding them in domestic laws or DTC rules.

While it is true that each jurisdiction has the right to apply its domestic law and exercise tax sovereignty, it is crucial to recognize that when two countries enter into a DTC, the treaty overrides domestic tax laws in both countries. Therefore, guidance or policy responses issued at the national administrative level cannot supersede treaty rules, which require negotiation and ratification to be amended.

Thus, even amidst the pandemic, altering taxing rights, either for a certain period or permanently, demands adherence to legislative processes and subject to negotiation and ratification procedures when involving tax treaty rules amendments, because even in a pandemic crisis the rule of law must not be abandoned. In an increasingly mobile world where individuals, companies and assets interact with multiple jurisdictions, it is crucial to interpret treaties accurately to address the multitude of detailed issues they seek to regulate. However, it is imperative to adhere to the rule of law and follow proper procedures for amending and changing existing tax laws.

Failure to do so can lead to undesired consequences such as the application of different standards and rules, rather than from the ones of existing DTC, both in times of crisis and regular circumstances. And most importantly allows for the application of mere administrative guidance instead of applicable national tax law and DTC clauses, without even needing a treaty ratification, as normally would be necessary. This undermines the integrity of DTCs, allowing for the application of multiple tax residence rules to the same individuals and causing double taxation to occur. While most jurisdictions unilaterally provide relief from juridical double taxation through their domestic income tax laws, not all countries have such provisions in their domestic laws.

Violations of international law provisions, such as those in DTCs, expose states to diplomatic pressure, economic sanctions, and potential unilateral sanctions against those who disregard international law provisions. Furthermore, taxpayers to which such administrative guidance was applied instead of DTC rules should be able to request the application of the correct applicable law to their conflicts on such basis.

The use of additional administrative guidance to address tax residency issues during COVID-19, instead of relying on national tax laws and DTC rules, can still lead to further several unintended consequences, namely the lack of clarity, ambiguity, inconsistency, and uncertainty in the application of rules, as administrative guidance often lacks the precision and legal certainty found in national tax laws and DTC clauses.

In conclusion, relying on administrative guidance that departs from established legal frameworks creates situations where the rules and standards applied during times of crisis differ from those in regular circumstances. This departure from established frameworks, as a result undermines the rule of law and leads to arbitrary or inconsistent treatment by reducing the safeguards provided by DTCs[245] and giving TAs significant discretion in decision-making, in interpreting and in applying tax rules. Leading to situations where the administrative guidance takes precedence over the established legal framework and TAs have the authority to make decisions without needing for treaty ratifications or formal legal processes.

Overall, there is a clear need, in this sense, to strengthen the rule of law ensuring enforcement of existing national tax laws and DTC rules, even during a pandemic crisis. This entails guaranteeing that any administrative guidance is consistent with the legal framework and that any deviations are justified and aligned with principles of fairness and equity. Furthermore, after the above-mentioned considerations it seems important that countries consider revisiting and updating the provisions in their DTCs to address unforeseen situations like pandemics. This could involve clarifying or expanding the criteria for tax residence or the creation of PEs to provide more guidance in exceptional circumstances.

245 DTCs are typically ratified by contracting countries and provide a legal framework for resolving cross-border tax issues by relying on administrative guidance instead of applicable national laws and treaty clauses, there can be instances where treaty safeguards and procedures, such as the requirement for treaty ratification, are bypassed. This raises concerns about proper enforcement of the rule of law and the protection of taxpayer rights, namely if administrative guidance is used instead, these taxpayers' rights may not be fully respected or enforced, potentially leaving taxpayers with fewer avenues to redress and protection.

iv.) Adapting DTCs: Lessons from the COVID-19 Pandemic

During the pandemic crisis it became evident that new interpretations of existing rules were being made/could have been made, deviating from the established framework of DTCs. This was often done through the use of MAP, or through the application of mere administrative guidance. However, "the existing legal system must prove itself, especially in difficult times and times of crisis"[246], and in line with this perspective, legal systems should be designed to be applicable even in adverse situations, with consistent application of rules regardless of the emergence of new circumstances or scenarios. However, during COVID-19, multiple instances were observed where the opposite was seen.

Additionally, it is also noteworthy to mention that these new interpretations made during the pandemic may have broader implications. They indicate that the previous interpretation of the rules, prior to COVID-19, were either too restrictive or too broad, necessitating the establishment of new interpretations to progress.[247],[248] This implies that the scope of these interpretations possibly should not be limited to the duration of the pandemic itself.

In conclusion, despite the issuance of a few publications by the OECD addressing the impact of COVID-19 on DTCs, there was in fact, no uniform regulation. The insufficiency of the OECD MTC's tiebreaker rules and distributive criteria to cover every situation, led to a relevant discussion on how this issue was considered and addressed. The analysis presented above demonstrates that the factual situations arising from the COVID-19 pandemic, initially considered temporary or extraordinary, have resulted in ongoing situations that demand adaptations and new interpretations of ITL and of the criteria outlined in the OECD MTC. This is necessary to address future unprecedented and extraordinary events adequately. It is evident from the analysis and factors discussed that the existing legal framework of DTC did not prove effective during COVID-19 pandemic, and the standards and rules of domestic tax laws were not applied consistently compared to normal circumstances.

Therefore, while the existing DTC rules and OECD MTC commentaries provided a foundation for addressing the pandemic's impact on DTCs, a more nuanced analysis

246 LANG, Michael, "Building Global International Tax Law: essays in honour of Guglielmo Maisto".

247 Namely, this can be seen in the fact that during COVID-19 multiple countries, and the OECD in its guidance suggested an overall more restricted application of tax residency rules than usual.

248 *Ibidem.*

reveals the need for further examination and potential refinements in the interpretation and application of these rules. The need for additional measures, the flexibility in DTC application, and the utilization of the MAP process all contribute to potential variations and inconsistencies in how TAs interpreted and applied tax rules during this extraordinary period. All this leads to the question of how will the ITL and DTC's legal framework change in the face of the next adversity? A more comprehensive and coordinated approach is necessary to achieve consistency, reduce uncertainty, and maintain trust in the international tax system when addressing future challenges similar to this pandemic.

4.2. Implications of our Study for the Post-COVID-19 Era of ITL

It is notable that the COVID-19 pandemic has significantly impacted the concept of tax residency and has brough forth various implications for the future of DTC and ITL. These changes brought by the pandemic could lead to a shift in the way tax residence is approached, making it more of a permanent consideration rather than just a temporary challenge. This study has examined the key aspects influenced by the pandemic and explored the potential changes that may shape the future of international tax frameworks on this matter.

One of the notable effects is the temporary changes in residence rules implemented during this time to address the challenges faced by individuals. Namely, the relaxation of physical presence requirements and the introduction of exceptional circumstances clauses. For example, some countries have introduced the concept of "exceptional circumstances" or "force majeure" to consider the impact of COVID-19 on an individual's residency status. The success and acceptance of these temporary measures could pave the way for discussions on incorporating similar flexibility into future DTC rules.

Additionally, the increased focus on the tiebreaker rules, which determines tax residence in cases of dual residence under DTCs, have gained greater importance during the pandemic. These rules usually consider factors such as the individual's permanent home, habitual abode, and center of vital interests. However, the impact of COVID-19, including travel restrictions and temporary relocations, has necessitated a closer examination of these factors to determine the individual's true tax residence, as well as the adoption of more subjective requirements such as individuals or businesses intention and purpose of the stays in certain countries.

The widespread adoption of remote work arrangements due to COVID-19 has raised questions regarding the creation of PEs. Many individuals and businesses have experienced the feasibility and benefits of working remotely, leading to a potential long-term shift in work arrangements. This shift challenges the traditional PE rules, and the notion of tax residence, which are often based on physical presence in a specific jurisdiction. As remote work becomes more prevalent, TAs and policymakers may need to reassess and adapt the existing rules to accommodate this new reality.

Traditional rules for determining tax residency often rely on the concept of physical presence in a jurisdiction for a certain period. However, COVID-19 has led to widespread travel restrictions and remote work arrangements, making it challenging to meet the conventional physical presence criteria. This has prompted discussions on whether the reliance on physical presence should be reconsidered or modified in future DTC rules to allow for more adaptive criteria during extraordinary events like a global pandemics. Moreover, the pandemic has forced individuals and businesses to rely heavily on virtual communication and collaboration tools. Virtual meetings, conferences, and remote business transactions have become the norm. This increased acceptance of virtual presence raises questions about how tax residence should be determined in a world where individuals can effectively conduct business activities without physically being present in a particular jurisdiction. Future discussions may center around incorporating virtual presence as a relevant factor in determining tax residency.

In this sense, the above-mentioned effects highlight the potential space for treaty renegotiation. The pandemic has exposed certain limitations and gaps in existing DTC provisions, particularly in relation to unforeseen circumstances and the digital economy. In some cases, countries may consider renegotiating specific provisions or updating their DTCs to better align with the new economic and social realities. These renegotiations can focus on issues such as remote work and the physical presence criterion.

Another notable effect that arises as a result of the temporary measures or specific guidance implemented during the pandemic by many countries is that these responses acknowledged the exceptional circumstances and provided relief for individuals stranded in jurisdictions due to travel restrictions. However, the fact that such measures were implemented and acknowledged by TAs and administrations signifies a recognition of the evolving landscape and the need for flexibility in tax residency rules nowadays. This recognition could pave the way for more permanent changes in the future.

Overall, the COVID-19 pandemic has prompted discussions and considerations regarding the future of tax residency and DTC rules. The challenges posed by the pandemic, such as remote work, digitalization, and international coordination, have underscored the importance of international cooperation in tax matters. There have been calls for increased harmonization of tax rules to avoid double taxation and address complexities arising from exceptional situations like a global health crisis.

Any significant changes to DTC rules require consensus among countries and careful consideration of their respective interests. The long-term impact of COVID-19 on tax residence rules is an ongoing discussion among tax experts, policymakers, and international organizations. The extent of these changes will depend on various factors, including the duration and lasting effects of the pandemic, societal and technological advancements, and the willingness of countries to adapt their tax systems to the evolving global landscape. In conclusion, the COVID-19 pandemic has brought about significant shifts in the understanding and application of tax residence and DTC rules.

The pandemic has acted as a catalyst for discussions on reconsidering the reliance on physical presence, incorporating flexibility into residence criteria, and increasing harmonization among countries. As the global community continues to navigate the challenges and lessons learned from the pandemic, it is crucial to engage in ongoing dialogue and cooperation to shape the future of international tax frameworks in a fair, efficient, and sustainable manner.

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