

LLM Programme International and European Legal Studies
International and European Tax Law

4. Tax residence

Andreas Tsourouflis

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Case study 1

- A is a famous singer of UK nationality, who receives payments for record sales from all over Europe. He lives permanently in France with his wife and child and travels to the UK only for concerts and recordings. On April 20th, 2023 A splits up with his wife and moves permanently with his new girlfriend to Italy.

A requests your professional advice about which country he should declare his income to.

Case study 2

- A, a German company, has established subsidiary B in the UK. In order to ensure a coherent business policy, A has appointed its Legal Counsel, its CFO (Chief Financial Officer) and its Chief Accountant as directors of B. Given that all three aforementioned persons reside permanently and work in Germany, they request for convenience reasons that at least some of B's Board Meetings be held in Germany. However, the company's tax consultant insists that all Board Meetings should be held in the UK, without exception. He even demands that the German Board Members keep all flight tickets to the UK as well as all pertinent hotel accommodation receipts.

Do you agree with the tax consultant's opinion?

Tax Residence

Concept

- National tax claims: "Connecting factors"
 - ◆ Subjective: taxable person
 - Residence
 - Nationality
 - ◆ Objective: taxable event
 - Source of income
 - Location of real property

Tax Residence

Fiscal jurisdiction

Residence link

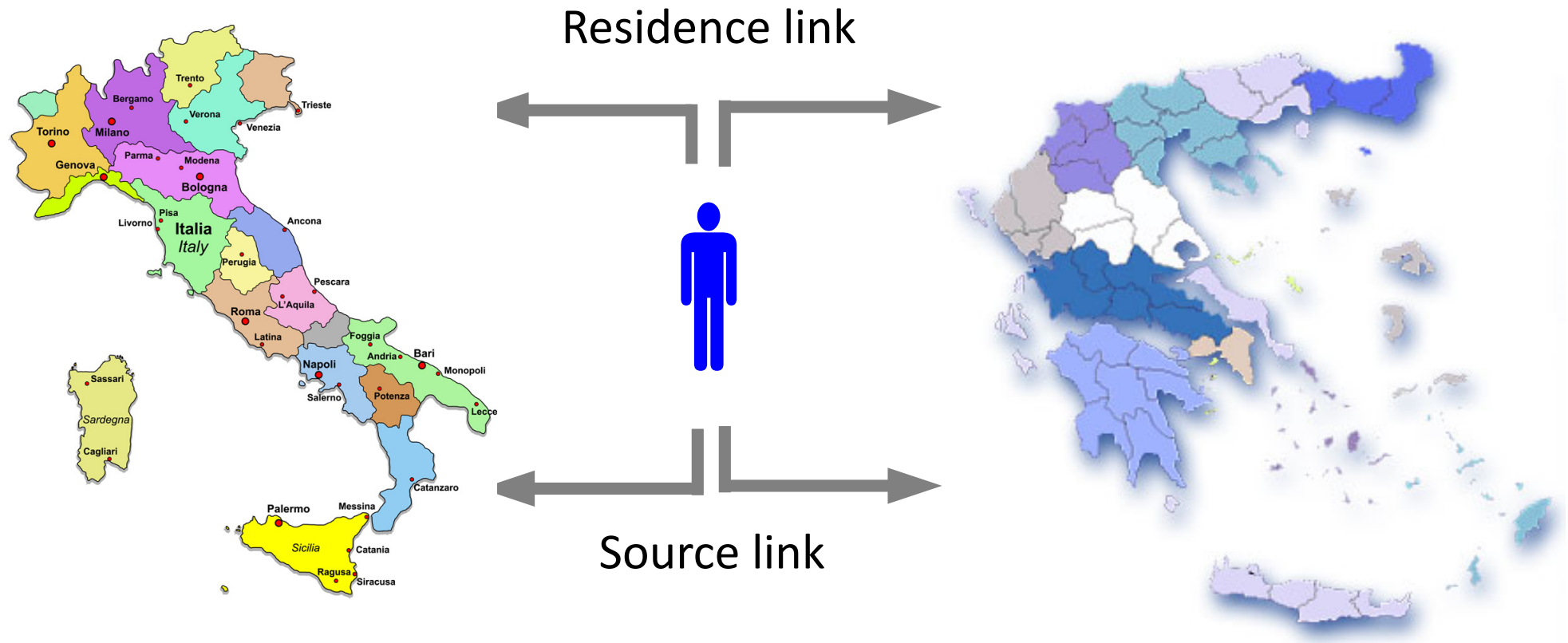


Source link



International and European Tax Law

Fiscal jurisdiction



Tax Residence

Concept

- Legal implications
 - ◆ National taxation
 - Tax residents are taxed on worldwide income
 - Tax non-residents are taxed only on source income
 - ◆ International taxation
 - Double taxation in conflict cases
- Terminology
 - ◆ Worldwide income: income from all sources, irrespective of their country of origin.
 - ◆ Source income: income arising in the country that claims the right to tax

Tax Residence

Concept

Example:

- A is a UK national who acquires the following income items
 - ♦ Employment income in the Netherlands – EUR 40,000
 - ♦ Dividends from a German company – EUR 30,000
 - ♦ Rental income from a house located in France – EUR 20,000
 - ♦ Interest from a bank account in Swiss – EUR 10,000
- What is his taxable income in the state of residence?

Tax Residence

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 - ◆ Interest from a bank account in Swiss – EUR 10,000
- What is his taxable income in the state of residence?
- If he is a Dutch tax resident:
 - ◆ Netherlands: $40,000 + 30,000 + 20,000 + 10,000 = 100,000$
 - ◆ Germany: 30,000
 - ◆ France: 20,000
 - ◆ Swiss: 10,000

Tax Residence

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- What is his taxable income in the state of residence?
- If he is a German tax resident:
 - ♦ Netherlands: 40,000
 - ♦ Germany: $30,000 + 40,000 + 20,000 + 10,000 = 100,000$
 - ♦ France: 20,000
 - ♦ Swiss: 10,000

Tax Residence

Concept

- Definition: Tax residence refers to a person's legal status in relation to a particular country such as in general to justify subjecting that person to taxation on their worldwide income
- "Tax residence" is a tax term
- Synonyms
 - ◆ Tax residency
 - ◆ Fiscal residence
- Tax residence does not affect the taxpayer's legal status as regards
 - ◆ Civil law
 - ◆ International private law

Tax Residence

Concept

- Tax residence
 - ◆ Individuals: personal attachment to the country concerned
 - ◆ Legal persons
 - Formal criterion: place of incorporation
 - Substantive criterion: place of management/administration

Tax Residence

Legal basis

- Applicable legislation
 - ◆ National level: Each jurisdiction applies its own rules for determining the tax residence
 - ◆ International level: Tax treaties
- System
 - ◆ Tax residence is determined according to domestic rules
 - ◆ Tax treaties serve only to resolve conflicts
 - They do not assign the status of a tax resident
 - They prescribe an approved set of criteria
 - Only in case of conflict, they apply tie-breaker rules
- Different rules for individuals and companies

Tax Residence

Determining tax residence (individuals)

- 3 principal approaches
 - ◆ Time spent in a particular country
 - number of days spent in a country in any given period or consecutive periods
 - Most common rule: 183-day period (equivalent to 6 months)
 - ◆ Connections with a particular country
 - Personal and economic ties to a country: "center of vital interests"
 - It is a fact issue: it is considered ad hoc
 - ◆ Residence rules adopted for other purposes, e.g.
 - Citizenship
 - Work permit
 - Green card, etc.

Tax Residence

Determining tax residence (individuals)

- Residence by investment
 - ◆ Non-dom regimes
 - ◆ So-called "golden passports" or "golden visas"

Tax Residence

Determining tax residence (individuals)

- Non-dom regimes
 - ◆ Special tax regimes for non-residents
 - ◆ They acquire the status of tax resident
 - ◆ Benefits
 - No other criteria for obtaining the tax residence
 - Special tax treatment
 - Tax treaty protection
 - ◆ Many countries apply such schemes: e.g. Cyprus, Greece, Italy, Portugal, UK

Tax Residence

Determining tax residence (individuals)

- "Golden passports" / "Golden visas"
 - ◆ Incentives to attract foreign investment
 - ◆ They provide access to the privileges of citizenship or residence in return for specified investments
 - ◆ Depending on the regime, special tax treatment
 - ◆ No tax residence
 - ◆ Many countries apply such schemes: e.g. Bulgaria, Cyprus, Estonia, Greece, Ireland, Italy, Latvia, Malta and Portugal
 - ◆ Trend to suspend, amend or restrict such regimes
 - Political pressure by EU
 - Russia-Ukraine war

Taxation of cross-border activities

OECD Model

ARTICLE 4

RESIDENT

1. For the purposes of this Convention, the term “resident of a Contracting State” means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof as well as a recognised pension fund of that State. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.

Taxation of cross-border activities

OECD Model

ARTICLE 4 RESIDENT

2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:

- a) he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);
- b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode;
- c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;
- d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

Tax Residence

Determining tax residence (individuals)

- Dual residence:
 - ◆ when fulfilling the criteria under the domestic law in two or more states
 - ◆ Result: double taxation
- Tax treaties:
 - ◆ tax residence must apply to only one state
 - ◆ Solution: tie-breaker rule

Tax Residence

Resolving dual tax residence (individuals)

- Tie-breaker rule: a set of priority-ranked tests
 - ◆ a dual-resident individual is determined to be a resident in the contracting state in which he has his permanent home;
 - ◆ if he has his permanent home in both contracting states, one should look to the contracting state in which he has his centre of vital interests (CVI);
 - ◆ if he does not have a permanent home in either contracting state, or if it is not possible to determine his CVI, the next step is to determine his place of habitual abode;
 - ◆ if he does not have a habitual abode in either contracting state, one should look to the contracting state of which he is a national;
 - ◆ if he is not a national of either contracting state, or is a national of both contracting states, the matter should be resolved by the competent authorities through mutual agreement.

Tax Residence

Resolving dual tax residence (individuals)

- 1st test: Permanent home
 - ◆ The main criterion here is “permanence”
 - ◆ the individual must have the dwelling available to him at all times, continuously.
 - ◆ Where the dwelling is provided on a short-term basis, the condition is not met.

Tax Residence

Resolving dual tax residence (individuals)

- 2nd test: Centre of vital interests
 - ◆ Centre of vital interests: the State with which the personal and economic relations of the individual are closer
 - ◆ Considerations
 - family and social relations
 - occupations
 - political, cultural or other activities
 - place of business
 - the place from where the taxpayer manages his property
 - ◆ Circumstances must be examined as a whole

Tax Residence

Resolving dual tax residence (individuals)

- 3rd test: Habitual abode
 - ◆ Meaning: the state where the taxpayer “lived habitually, in the sense of being customarily or usually present”
 - ◆ Considerations
 - All taxpayer’s stays within each contracting state, regardless of the place
 - All taxpayer’s stays within each contracting state, regardless of the reasons for the stays
 - The quality of the tax-payer’s stay in either contracting state (so-called qualitative approach)

Tax Residence

Resolving dual tax residence (individuals)

- 4th test: Nationality
 - ◆ Citizenship
 - ◆ Passport

Tax Residence

Resolving dual tax residence (individuals)

- 5th test: Mutual agreement
 - ◆ Mandatory requirement
 - ◆ Binding obligation on the competent authorities to resolve the matter

Tax Residence

Determining tax residence (companies)

- 2 principal approaches
 - ◆ Legal approach: based on the legal form
 - country of incorporation; or
 - country of registry in the commercial register
 - ◆ Economic approach: based on commercial connection
 - place of management;
 - principal business location; or
 - tax residence of shareholders (not widely used).
- Many countries use a combination of the two approaches

Taxation of cross-border activities

OECD Model

ARTICLE 4

RESIDENT

3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Convention, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by this Convention except to the extent and in such manner as may be agreed upon by the competent authorities of the Contracting States.

Tax Residence

Resolving dual tax residence (companies)

- Tie-breaker rule: mutual agreement by the Contracting States
- Mutual agreement: the competent authorities should consider certain relevant factors
 - ◆ the place of effective management
 - ◆ the place of incorporation
 - ◆ the place where the entity is constituted.
- Other factors listed in the OECD Commentary
 - ◆ 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 normally carry out their activities;
 - ◆ where the senior day-to-day management is carried out;
 - ◆ where the taxpayer's headquarters are located;
 - ◆ which country's laws govern the legal status of the taxpayer; and
 - ◆ where the taxpayer's accounting records are kept.

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