International Mobility of Work and Its Tax Challenges

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Abstract
International mobility of work is not something new, but it certainly received new contours after the COVID-19 pandemic. New forms of work emerged or gained a significant boost, such as remote work and digital nomadism. Alongside them, challenges appeared for many areas, including Tax Law. In this sense, the present study aims to examine these challenges from the perspectives of corporate and individual taxation. Historically, physical presence has been an important nexus for determining the tax residence of legal entities and individuals, as well as for allocating taxing powers among Contracting States in double tax treaties. This article questions such a historical nexus, dives into the tax impacts of international mobility of work and presents some alternatives that might be useful to navigate a highly mobile world.
Keywords: international mobility of work, challenges, taxation.

1. Introduction

International migration has always been a controversial issue, which involves social, economic and legal components. People leave their home countries for humanitarian, economic, religious, work reasons, among others.

The COVID-19 pandemic enhanced this process, especially with regard to the mobility of work. New work categories emerged or, at least, gained a significant boost, for instance remote work and digital nomadism. Such a phenomenon poses many challenges to different areas.

In this context, the present article aims to address the tax challenges both from the corporate and individual taxation standpoints, without any intention to exhaust them, proposing, at a certain extent, some alternatives. After all, the exercise of an economic activity no longer demands a physical presence of the individual or the company in a certain jurisdiction.

For this purpose, this study is divided into 4 (four) parts. First, a general and brief analysis of international migration, with particular focus on the international mobility of work. In this section, specific data highlights the growth of migration for work and, consequently, the importance to discuss the tax challenges

derived from it. Likewise, the introduction of special tax regimes to attract qualified personnel presents, on one hand, a sort of conflict with protectionist migration measures, and, on the other, the urge to create a debate forum to discuss the matter.

Second, it is paramount to dive into the challenges imposed by international mobility of work as regards corporate taxation. Despite the implications to labour law and social security systems, the present study restricts its analysis to the characterization of a permanent establishment (PE), tax residence and economic substance issues.

The third section examines the challenges related to individual taxation. Such a topic was forgotten by tax administrations and international organizations (*e.g.* the OECD and the UN)[1], which have been focusing exclusively on corporate taxation. This part deals with the determination of tax residence and the application of double tax treaties clauses, especially considering that physical presence is still an important nexus within tax treaties and internal laws.

Finally, the present study outlines some alternatives to address the tax challenges derived from the international mobility of work. It is indispensable that tax administrations, academia and international organizations address the problems of the "new normal".

2. International labour migration

As Reuven Avi-Yonah well argues[2], individuals and work were traditionally considered as relatively immobile due to migration restrictions. However, technological and labour devolpments, social and demographic changes and tax competition for individuals shaped a different scenario. In this sense, not only companies are highly mobile, but also individuals.

According to the OECD Migration Report 2024[3], global migration of individuals has reached new records in 2023. More than 150 million people in OECD countries were foreign-born, 6.5 million permanent immigrants arrived in OECD countries and 2.4 million work permits were granted in OECD countries (16% year-on-year increase). In 2022, 17% of the self-employed in OECD countries on average were migrants, against 11% in 2006.

Likewise, the UN International Organization for Migration (IOM) released its World Migration Report for 2024[4]. According to it, there were around 281 mil-

[1] Cf. ROCH, Maria Teresa Soler. Chapter 10: Individuals: The Forgotten Taxpayers in a BEPS Scenario. *In*: PISTONE, Pasquale (ed.). *Building Global International Tax Law*: essays in Honour of Guglielmo Maisto. Amsterdam: IBFD, 2022, p. 197-216.

[2] AVI-YONAH, Reuven S. And Yet it Moves: Taxation and Labor Mobility in the 21st Century. *University of Michigan Law & Economic Research Paper*. May, 2012, no. 12-008. Available at SSRN: https://ssrn.com/abstract=2055160. Access on 17 Dec. 2024.

[3] OECD. International Migration Outlook 2024. 48th ed. Paris: OECD Publishing, 2024.

[4] IOM. World Migration Report 2024. United Nations. Geneva, 2024.

lion international migrants in the world in 2020. The main reasons for migrating are commonly related to work, family and study. People migrating due to conflicts and disasters are the minority; however, they are the most vulnerable and definitely need some assistance and protection.

Such a reality does not involve only individuals who are seeking better living conditions and job opportunities, but also the high net-worth individuals (HNWIs). The latest Henley Private Wealth Migration Report identified that 128.000 HNWIs are expected to migrate in 2024, comparing to 51.000 in 2013[5]. These individuals usually migrate to United Arab Emirates, United States of America and Singapore, leaving their home countries (mainly, China, United Kingdom and India) motivated by residence and citizenship investment programs[6].

Currently, globalization is the main triggering element for migratory movements between countries and determines its features, apart from armed conflicts and natural disasters. Migration is part of survival strategies and social mobility. It is not something new, but it definitely gained momentum after the COVID-19 pandemic.

Interesting to highlight that the IOM Report acknowleged that "human migration and mobility have rebounded considerably since the nadir of the pandemic in mid-2020, but remain below 2019 levels for most of the world"[7]. Such a statement is extremely important, because it shows that restrictions imposed during COVID, albeit dropped a while ago, are still producing effects on migration, especially with the adoption of a "complex and restrictive migration policy"[8].

Svetlana Ruseishvili listed four lessons of the pandemic on global mobility in the contemporary world[9]. The first one is that mobility is unequally distributed. The second is that mobility should be understood in parallel with immobility (mobility and forced immobility as faces of capitalism). Third, closing the border does not avoid people from migrating, but increases the risks related to migration. Finaly, tackling the "illegalization" of migrants benefits the society as a whole.

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5 HENLEY & PARTNERS. The Henley Private Wealth Migration Report 2024. Available at: https://www.henleyglobal.com/publications/henley-private-wealth-migration-report-2024. Access on 17 Dec. 2024.

6 For instance, Portugal's Golden Residence Permit Program, Greece's Golden Visa Program and Spain's Residence by Investment Program.

7 IOM. World Migration Report 2024. United Nations. Geneva, 2024, p. 243.

8 IOM. World Migration Report 2024. United Nations. Geneva, 2024, p. 264.

9 RUSEISHVILI, Svetlana. Quatro lições da pandemia sobre a mobilidade no mundo contemporâneo. *In*: BAENINGER, Rosana; VEDOVATO, Luís Renato; NANDY, Shailen (coords.); ZUBEN, Catarina von; MAGALHÃES, Luís Felipe; PARISE, Paolo; DEMÉTRIO, Natália; DOMENICONI, Jóice. (org.). *Migrações internacionais e a pandemia de COVID-19.* Campinas: Núcleo de Estudos de População "Elza Berquó" – Nepo/Unicamp, 2020, p. 160-166.

George Martine understands that international migration is an "inevitable process", which presents positive and negative aspects[10]. In this sense, the formulation of migratory policies depends on the revaluation of the positive aspects of migration and the progressive reduction of its negative effects.

Martine highlights that the advantages of international migration encompass the local economic impacts of international remittances, social organization, modernization and gender equality, population renewal (perspective of the host country)[11]. On the other hand, the disadvantages consist of "brain migration", social and racial discrimination (*e.g.* xenophobia)[12].

It is undeniable that there are still limitations on international migration, especially derived from protectionist policies ("close the borders policy")[13]. The recent US election and the position of President Donald Trump evidentiates such a reasoning. In any case, the advantages of international migration surpass the disadvantages.

One may argue the importance of a transition from "migratory control" to "migratory management". One important proof of this transition relies on the special tax and non-tax regimes for individuals introduced around the globe[14], which contribute to the formation of a "global labour market".

Many countries have been creating special visas to digital nomads and remote workers and, in some cases, conceding tax incentives. In a certain extent, such a trend contradicts the restrictions often imposed on international migration and evidentiates that there are, in fact, incentives to migrate, which clearly stress the current international tax system.

Considering the evident growth of international mobility of work, especially after the COVID-19 pandemic, and the introduction of special regimes for individuals, it becomes paramount to examine the challenges and impacts of such a phenomenon not only from the perspective of corporate taxation but also from the perspective of individual taxation.

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[10] MARTINE, George. A globalização inacabada. Migrações internacionais e pobreza no século 21. *São Paulo em Perspectiva*, v. 19, no. 3, jul./set. 2005, p. 4.

[11] MARTINE, George. A globalização inacabada. Migrações internacionais e pobreza no século 21. *São Paulo em Perspectiva*, v. 19, no. 3, jul./set. 2005, p. 12-15.

[12] MARTINE, George. A globalização inacabada. Migrações internacionais e pobreza no século 21. *São Paulo em Perspectiva*, v. 19, no. 3, jul./set. 2005, p. 16-18.

[13] Cf. VAN WAAS, Laura Fighting Statelessness and Discriminatory Nationality Laws in Europe. *European Journal of Migration and Law*, no. 14, 2012, p. 243–260; ARAUJO, Natália Medina. Migrantes indocumentados: histórias e aporias. *In*: GALINDO, George B (org). *Migrações, deslocamentos e direitos humanos*. Brasília: Instituto Brasiliense de Direito Civil, Grupo de Pesquisa Crítica e Direito Internacional, 2015, p. 25-34.

[14] Cf. PIGNATARI, Leonardo Thomaz. The Taxation of 'Digital Nomads' and the '3 W's': Between Tax Challenges and Heavenly Beaches. *Intertax*, v. 51, no. 5, 2021, p. 384-396.

3. The corporate tax challenges of international mobility of work

The international tax system deeply relies on physical presence as a nexus for determing residence and allocating taxing rights. Double tax treaties operate, in general, between the Residence State and the Source State. They never create tax obligations, only attribute taxing powers. It depends on the domestic legislation of the States whether they are going to tax a specific scenario.

Normally, taxing rights are allocated exclusively to the Residence State, but, in certain situations, the Source State may tax if there is a nexus of significant economic presence ("economic allegiance").

In this context, the international mobility of individuals, with the emergence of new modalities of work, poses different challenges to corporate taxation. The goal of this section consists of examining three main challenges: (i) residence's determination, (ii) characterization of a permanent establishment, and (iii) economic substance.

3.1. Tax residence for legal entities

The domestic legislation is responsible for determining the tax residence of legal entities, adopting nexus as place of incorporation, place of effective management, place of the headquarters, etc. Double tax treaties only operate when there is a double-residence conflict, that is, when an entity is considered resident of two States according to their internal laws. In such a situation, the treaty tiebreker rule is applicable (*e.g.* place of effective management or mutual agreement procedure).

Until 2017, the OECD Model Tax Convention (OECD-MC) adopted, in its article 4, paragraph 3, the place of effective management (POEM) as a tiebreaker rule for residence of legal entities. There is no definition of POEM in double tax treaties, but the OECD Commentaries on Article 4 of the OECD-MC state that it is "the place where key management and commercial decisions that are necessary for the conduct of the entity's business as a whole are in substance made"[15].

In any case, it is not easy to assert what this commentary actually means or how it is applied in practice. Pursuant to doctrine, jurisprudence and domestic legislation, POEM might be understood as the place where the senior executives or board are located, the place of "pratical day-to-day management" regardless where the supervision power takes place, or the place where the main administrative and commercial decisions are made[16].

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[15] OECD. Commentaries on Article 4 of the Model Tax Convention on Income and on Capital 2014. Paris: OECD Publishing, 2014, para. 24.

[16] For further details on tax residence of entities under double tax treaties, specifically regarding the POEM rule cf. GALDINO, Guilherme. *A residência das pessoas jurídicas nos acordos para evitar a dupla tributação.* São Paulo: IBDT, 2022, p. 230-277.

Therefore, POEM is a very open concept. Such a multiplicity of meanings and criteria facilitates the margin for abuse, since the place where the company is effectively managed might be easily abused by transferring it to a low-tax jurisdiction. One way is to transfer the senior executives and board members to a tax haven.

For this reason, the latest OECD Model Tax Convention (2017) changed the tiebreaker rule for tax residence of legal entities from POEM to the mutual agreement procedure (MAP)[17]. Despite such a change, most of double tax treaties follows the previous rule, meaning that gaps for abuse are still present.

Considering the higher mobility of individuals across the globe, there might be special restrictive circumstances that lead to a POEM's change. For example, the relocation and impossibility to travel of board members and senior executives. The concern is precisely that such a scenario could change the company's residence under the domestic laws and affect the State where a company is considered resident for tax treaty purposes.

The OECD examined this issue in two different opportunities during the COVID-19 pandemic. In the first one, it clarified that "it is unlikely that the COVID-19 situation will create any changes to an entity's residence status under a tax treaty", inasmuch as the relocation of senior executives and board members represents an "extraordinary and temporary situation due to the COVID-19 crisis"[18]. In a second moment, the OECD simply reiterated its previous position[19].

Some countries, like Australia[20], Canada[21], Greece[22], Ireland[23], New Zealand[24] and United Kingdom[25], issued administrative guidance on the matter.

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17 OECD. Model Tax Convention on Income and on Capital: Condensed Version 2017. Paris: OECD Publishing, 2017.

18 OECD. OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis. 3 April 2020. Available at: https://www.oecd.org/en/publications/oecd-secretariat-analysis-of-tax-treaties-and-the-impact-of-the-covid-19-crisis_947dcb01-en.html. Access on 17 Dec. 2024, p. 3-4.

19 OECD. Updated guidance on tax treaties and the impact of the COVID-19 pandemic. 21 January 2021. Available at: https://www.oecd.org/en/publications/updated-guidance-on-tax-treaties-and-the-impact-of-the-covid-19-pandemic_df42be07-en.html. Access on 17 Dec. 2024, p. 9-11.

20 AUSTRALIA. Working out your residency. Available at: https://www.ato.gov.au/businesses-and-organisations/international-tax-for-business/working-out-your-residency. Access on 17 Dec. 2024.

21 CANADA. International income tax issues: CRA and COVID-19. Available at: https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/guidance-international-income-tax-issues-covid.html. Access on 17 Dec. 2024.

22 GREECE. Available at: https://aade.gr/sites/default/files/2020-07/E2113_2020.pdf. Access on 17 Dec. 2024.

23 IRELAND. Concessions made for Corporation Tax. Available at: https://www.revenue.ie/en/covid-19-information/tax-clearance-filing-returns-paying-taxes/covid-19-concession-made-for-corporation-tax/presence-individuals-in-outside-state.aspx. Access on 17 Dec. 2024.

24 NEW ZEALAND. Tax residency status for companies. Available at: https://www.ird.govt.nz/international-tax/business/tax-residency-status-for-companies. Access on 17 Dec. 2024.

25 UNITED KINGDOM. HMRC Approach to Company Residence in response to COVID-19 Pandemic. Available at: https://www.gov.uk/hmrc-internal-manuals/international-manual/intm120185. Access on 17 Dec. 2024.

Generally, tax administrations clarified that the presence of a director in its territory does not affect the company's residence, as long as such presence derives from travel restrictions related to COVID-19.

In short, the OECD and many countries stated that nothing changes due to temporary and exceptional circumstances. Nonetheless, the problems of determining the POEM and, consequently, the tax residence for companies remain after COVID. In fact, they have increased, since there is a higher mobility of work and individuals, meetings might be taken virtually and senior executives might work remotely from home or different jurisdictions.

Conversely, from a Brazilian perspective, the relocation of senior executives does not create major problems, since the domestic legislation establishes that companies are resident where their headquarters are located. That is, if the company's headquarters is located in Brazil, it will be considered resident in Brazil, regardless the place where the main administrative and commercial decisions are made.

In this regard, as Luís Eduardo Schoueri and Renand Baleeiro Costa point out, "formal aspects of management (i.e. what the company declares to be its head office) are more important than substantial aspects such as where management decision are in fact taken"[26]. The place of effective management may be relevant for Brazilian tax treaties when there is a dual-residence conflict, but, from the internal law's standpoint, it has a minor importance.

In any case, the impacts of international mobility of work, specifically of senior executives' relocation, on legal entities' residence for purposes of domestic law and double tax treaties should not be ignored. Companies should, therefore, carefully analyse its internal policies in order to avoid problems of determining their tax residence.

3.2. Characterization of a permanent establishment

In International Tax Law, the general rule is that business profits are taxed exclusively in the Residence State, unless there is a permanent establishment in the other State. Permanent establishment (PE) is a nexus for allocating taxing rights to the jurisdiction where there is a significant economic presence to justify taxation therein, meaning the "fixed place of business through which the business of an enterprise is wholly or partly carried on"[27].

Two elements are fundamental to characterize a PE: (i) a certain degree of permanence, and (ii) be at the disposal of the enterprise. Otherwise, there is no

[26] SCHOUERI, Luís Eduardo; COSTA, Renan Baleeiro. Chapter 4 – The Impacto of Tax Treaties on International Mobility of Work in Brazil. *In*: KOFLER, Georg; *et al.* (eds.). *Mobility of Work*. European and International Tax Law and Policy Series. Amsterdam: IBFD, 2024, p. 151.

[27] OECD. Model Tax Convention on Income and on Capital: Condensed Version 2017. Paris: OECD Publishing, 2017, article 5, para. 1.

fixed place of business through which the business of that entrerprise is wholly or partly carried on.

One of the biggest concerns of companies in relation to international mobility of work relies on the possible caracterization of a permanent establishment due to the remote work exercised by its employees.

The question is, then, the following: employees working remotely from a jurisdiction different from the one where the employer resides trigger a permanent establishment? In other words, the place or places of work constitute a permanent establishment, allowing for taxation therein? Would there be a "home-office PE"?

Before COVID, some Courts examined the possibility of a home-office characterizes a PE. Pasquale Pistone and Mario Tenore identified two lines of judicial reasoning[28]. First, an "open line", according to which a home office may constitute a PE as long as it is at disposal of the employer on a permanent basis and is furnished for the needs of the employer, with examples in the Netherlands, Norway and South Africa. The second is a "restrictive line", composed by German and Swiss decisions, which limits the cases of home-office PE to exceptional circumstances.

During the COVID-19 pandemic, many countries issued administrative guidance[29], treating the situation as temporary and exceptional, as long as the sole cause for the possibility of a PE relies on the health crisis and the enterprise did not otherwise have a permanent establishment before the effects of COVID.

The OECD has also expressed its position that "the exceptional and temporary change of the location where employees exercise their employment because of the COVID-19 pandemic, such as working from home, should not create new PEs for the employer"[30]. The same reasoning was applied to "agent PE" (temporary conclusion of contract in the home of employees or agents) and "construction PE" (temporary work interruption).

Back then, two main reasons supported the OECD's explanation. First, the fact that the house of the employee is not at disposal of the employer, meaning

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[28] PISTONE, Pasquale; TENORE, Mario. General Report. *In*: KOFLER, Georg; *et al*. (eds.). *Mobility of Work*. European and International Tax Law and Policy Series. Amsterdam: IBFD, 2024, p. 27-34.

[29] AUSTRALIA. Working out your residency. Available at: https://www.ato.gov.au/businesses-and-organisations/international-tax-for-business/working-out-your-residency. Access on 17 Dec. 2024; AUSTRIA. Austrian Guidance with regard to the application and interpretation of DTT during the COVID-19 pandemic, "Info zur Anwendung und Auslegung von Doppelbesteuerungsabkommen im Zusammenhang mit der COVID-19 Pandemie". Available at: https://findok.bmf.gv.at/findok?execution=e100000s1&segmentId=719aaa9a-fba3-4ad0-b331-ea4919b90f3b. Access on 17 Dec. 2024.

[30] OECD. OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis. 3 April 2020. Available at: https://www.oecd.org/en/publications/oecd-secretariat-analysis-of-tax-treaties-and-the-impact-of-the-covid-19-crisis_947dcb01-en.html. Access on 17 Dec. 2024, p. 1-3.

that working from home does not lead to the conclusion that the location is at the disposal of the enterprise. Moreover, the lack of a sufficient degree of permanence, since a PE must be used "on a continuous basis carrying on business of an enterprise and the enterprise generally has to require the individual to use that location to carry on the enterprise's business". During COVID, it was not an employer's demand to work from home, but a force majeure.

In another statement, the OECD acknowledged the possibility of a PE in case an individual keeps working from home even after the restriction measures are lifted. In this situation, the home office may have a degree of permanence, but a "further examination of the facts and circumstances will be required to determine whether the home office is now at the disposal of the enterprise following this permanent change to the individual's working arrangements"[31].

In this sense, it is important to examine the contractual arrangements and the degree of flexibility that an individual has or has not to work remotely from home or other places, jurisdictions.

Therefore, when an individual works from home for a sufficient period, there must be an analysis on whether he or she was required by the employer to work from home. For instance, the company has not provided an office or the employment contract expressly requires to work remotely. In such a case, the home office may be considered to be at disposal of the employer, as long as the employee is effectively exercising the enterprise's business therein. On the other hand, if the employee has the flexibility to work from home or the employer's premises, or to choose from where to work remotely, it becomes harder to argue that the location is at disposal of the enterprise.

Another relevant factor to take into account consists of the nature of the activities exercised by the employee remotely. For the characterization of a PE, there must be an effective exercise of the enterprise's business. If the employee merely exercises auxiliary or ancillary activities, there will not be a PE.

In face of this reality, many authors advocate changes on Article 5 of the OECD-MC. Pistone and Tenore support the adoption of a virtual PE, a "de minimis rule" (threshold to create a business nexus) and the amendment of the OECD Commentaries to clarify what constitutes a home office PE[32]. Svetislav V. Kostić, in his turn, proposes a "workforce presence test PE", according to which "the existence of certain personnel of the foreign enterprise in the source state, personnel

[31] OECD. Updated guidance on tax treaties and the impact of the COVID-19 pandemic. 21 January 2021. Available at: https://www.oecd.org/en/publications/updated-guidance-on-tax-treaties-and-the-impact-of-the-covid-19-pandemic_df42be07-en.html. Access on 17 Dec. 2024, p. 3-9.

[32] PISTONE, Pasquale; TENORE, Mario. General Report. *In*: KOFLER, Georg; *et al.* (eds.). *Mobility of Work*. European and International Tax Law and Policy Series. Amsterdam: IBFD, 2024, p. 11, 58-59.

without the existence of a fixed place of business of enterprise for which they are working, may be deemed to constitute the PE of that enterprise"[33].

One may wonder whether this discussion is relevant for the Brazilian landscape, since Brazil taxes non-residents' income based on the source of payment, not on the physical presence. As Schoueri and Costa clarify[34], Brazilian legislation provides only two cases of non-resident's taxation similar to a PE approach (net taxation): (i) taxation of branches and offices located in Brazil of non-resident enterprises, and (ii) taxation on income obtained in Brazil by a non-resident enterprise concluding sales through an agent in Brazil. The latter is more affected by international mobility, inasmuch as the agent can move to a different country and lose the Brazilian residence, which would avoid taxation in Brazil.

3.3. Lack of economic substance

New business models are reducing workplaces, shifting to work flexibility and establishing specific policies for remote working[35]. Such a mobile world presents important consequences for companies that choose to reduce their premises and allow their employers to work from home, especially considering the existence of substance requirements for accessing special domestic tax regimes and tax treaty benefits.

In a normal scenario, work mobility should not affect the fulfillment of substance requirements of legal entities, that is, the company should not be considered a sham exclusively because its activities are exercised remotely and it no longer has physical premises.

However, there are special circumstances in which the domestic legislation requires a sufficient number of employees located in the jurisdiction in order to grant a rulling or conclude an agreement with the tax authorities. Same situation may take place for the application of tax treaty benefits, such as a reduced rate for cross-border distribution of dividends.

In any case, the author believes that arguing the lack of economic substance of a company merely because it exercises its economic activities remotely, has no office and no equipments in its Residence State is a bit too much. A different conclusion totally deviates from the technological improvements, new work modalities and the current reality.

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[33] KOSTIC, S. V. A Plea for a Workforce Presence PE Concept in a Post-Covid Digitalized World. *Intertax*, v. 49, Issue 10, 2021, p. 758-770.

[34] SCHOUERI, Luís Eduardo; COSTA, Renan Baleeiro. Chapter 4 – The Impacto of Tax Treaties on International Mobility of Work in Brazil. *In*: KOFLER, Georg; *et al.* (eds.). *Mobility of Work*. European and International Tax Law and Policy Series. Amsterdam: IBFD, 2024, p. 152-153.

[35] Cf. PISTONE, Pasquale; TENORE, Mario. General Report. *In*: KOFLER, Georg; *et al.* (eds.). *Mobility of Work*. European and International Tax Law and Policy Series. Amsterdam: IBFD, 2024, p. 11-12.

4. The individual tax challenges of international mobility of work

For individuals, physical presence is much more important to determine where they reside (for instance, the "183-day rule") and to which jurisdiction should they pay taxes. Nonetheless, such a criterion is no longer a factual approach to deal with allocation of taxing rights in cross-border activities and to determine tax residence. Individuals are able to exercise their activities remotely, even outside the jurisdiction of the employer, and to live in different jurisdictions within a year (*e.g.* digital nomads[36]).

The introduction of special tax regimes to attract individuals by many countries adds a higher level of complexity to the matter. Besides the difficulties to apply the current rules to such a reality, there is clearly a competition among countries as regards individuals, which may be leading to a new "race to the bottom".

However, historically, little attention has been given by academia, international organizations and tax administrations to the impacts of digital economy on individual taxation.

Just recently, the OECD realized that individual taxation provides significant challenges that deserve a debate forum. The Global Mobility Project is a recent joint-initiative of the OECD and the Business Advisory Group on Migration to discuss "how to advance innovative approaches to managing mobility within the labour migration framework in OECD countries"[37]. However, no substantive report was presented, since the OECD is still structuring the project. A study is expected in 2025.

Other first-stage and more limited initiatives are worth mentioning. Under the Brazilian Presidency, the G20 expressed concerns on the taxation of the high net-worth individuals and the preferential tax regimes introduced worldwide, proposing a minimum tax for the super-rich[38]. For instance, the Brazilian Federal government has submitted a Bill of Law before the National Congress (PL no. 1.087/2025), which proposes the introduction of a minimum Personal Income Tax.

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[36] For a deeper analysis on this group and their tax impacts, cf. PIGNATARI, Leonardo Thomaz. The Taxation of 'Digital Nomads' and the '3 W's': Between Tax Challenges and Heavenly Beaches. *Intertax*, v. 51, no. 5, 2021, p. 384-396; KOSTÍĆ, Svetislav V. In Search of the Digital Nomad – Rethinking the Taxation of Employment Income Under Tax Treaties. *World Tax Journal*. Journal Articles & Opinion Pieces IBFD, v. 11, 2019, p. 189-225.

[37] OECD. Engaging with Employers in Skills Mobility Partnerships. Paris: OCDE, 2024. Available at: https://www.oecd.org/en/publications/engaging-with-employers-in-skills-mobility-partnerships_9e6da0ff-en.html. Access on 17 Dec. 2024.

[38] G20. G20 Rio de Janeiro Leaders' Declaration. G20 Brasil 2024: building a just world and a sustainable planet. Available at: https://www.gov.br/planalto/pt-br/media/18-11-2024-declaracao-de-lideres-g20.pdf. Access on 17 Dec. 2024.

Similarly, the UN, in its Terms of Reference for an UN Framework Convention on International Tax Cooperation, has defined as a priority area "addressing tax evasion and avoidance by high net-worth individuals and ensuring their effective taxation in relevant Member States"[39].

In light of these challenges to individual taxation, the present section aims to discuss two main aspects: (i) tax residence, and (ii) allocation of taxing rights, especially on employment income and on income derived by entertainers and sportspersons.

4.1. Tax residence for individuals

Normally, domestic legislations establish tax residence through the combination of two elements: subjective (intention) and objective (physical presence). Some countries provide additional criteria, such as permanent home, habitual abode or centre of vital interests. In any case, these criteria are challenged by the international mobility of individuals, who no longer need to execise their activities physically present in their employers' premises neither in their employers' jurisdiction, putting a question mark on the traditional "workplace".

For example, the Brazilian internal law makes a distinction between nationals and non-nationals for purposes of tax residence. Brazilian nationals are considered resident if they have a "definitive animus" to reside in the Brazilian territory. It is irrelevant how many days they spent in Brazil. However, residence rules for foreigners are based on objective criteria.

An individual who lives in Brazil permanently is a resident. A person who leaves the country to provide services as an employee to local authorities or departments of the Brazilian government located abroad is also a resident. An individual who leaves Brazil on a temporary basis, or permanently leaves the national territory without presenting communication of definitive departure, maintains his residence during the first twelve consecutive months of absence.

Other situations involve someone who enters Brazil with a permanent visa, on the date of arrival; or enters Brazil with a temporary visa and acquires an employment contract, completes 184 days in Brazil, consecutively or not during a period of 12 months, or obtains a permanent visa or employment contract before completing 184 days in Brazil.

Interesting to highlight that the Brazilian legislator also deals with cases of residents moving to low-tax jurisdictions. In such a case, Brazilian legislation adopts an "extended residence approach", according to which Brazil considers that this individual is still a Brazilian resident, unless he proves that he has effectively become a tax resident in that jurisdiction.

[39] UN. Draft Terms of Reference for a United Nations Framework Convention on International Tax Cooperation. 16 August 2024. Available at: https://financing.desa.un.org/sites/default/files/2024-09/2415701E.pdf. Access on 17 Dec. 2024.

There are countries that follow an "intermediate approach". They establish a personal nexus for individuals with some degree of non-occasional physical presence, but who do not complete 183 days in the territory ("resident aliens"). When examining such an approach, Pistone and Tenore considered it a good alternative to deal with the challenges of international mobility of work, since, on one hand, it prevents attempts to escape residence taxation and, on the other, avoids the disproportionate strecht of the personal nexus to situations of occasional presence (for instance, 2 months working remotely from a country)[40].

In double tax treaties, the tiebreaker rules for individual's residence follow an order of application[41]. The first rule is the permanent home. If a person has a permanent home in both States, he will be considered a resident where his centre of vital interests is located. 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, the habitual abode rule is applicable. If he has a habitual abode in both States or in neither of them, he will be deemed a resident only of the State of which he is a national. Finally, if he is a national of both States or of neither of them, the Contracting States shall settle the question by mutual agreement.

During the COVID-19 pandemic, the OECD has also expressed its position concerning the restrictions imposed by different countries and its impacts on tax residence[42]. The conclusion was the same: nothing changes. It is unlikely that a person would be considered a resident for the purposes of the treaty even if he was considered a resident under domestic law in light of the application the tiebreaker rules.

The OECD's position ignores situations in which there is no double tax treaty to regulate a dual-residence conflict. In a second statement, the OECD acknowledged that "a different approach may be appropriate however, if the change in circumstances continues when the COVID-19 restrictions are lifted"[43].

Such a "change in circumstances" has already occurred. Remote work and digital nomadism are realities that present greater challenges to tax administrations, legal entities and international organizations. How to determine the permanent home, habitual abode or centre of vital interests of a digital nomad? How to assess the personal and economic relations of a person who works remotely and

[40] PISTONE, Pasquale; TENORE, Mario. General Report. *In*: KOFLER, Georg; *et al.* (eds.). *Mobility of Work*. European and International Tax Law and Policy Series. Amsterdam: IBFD, 2024, p. 4.

[41] OECD. Model Tax Convention on Income and on Capital: Condensed Version 2017. Paris: OECD Publishing, 2017, article 4, para. 2.

[42] OECD. OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis. 3 April 2020. Available at: https://www.oecd.org/en/publications/oecd-secretariat-analysis-of-tax-treaties-and-the-impact-of-the-covid-19-crisis_947dcb01-en.html. Access on 18 Dec. 2024, p. 6-7.

[43] OECD. Updated guidance on tax treaties and the impact of the COVID-19 pandemic. 21 January 2021. Available at: https://www.oecd.org/en/publications/updated-guidance-on-tax-treaties-and-the-impact-of-the-covid-19-pandemic_df42be07-en.html. Access on 17 Dec. 2024, p. 11-14.

stays in multiple jurisdictions within a year? Could a remote worker establish tax residence in a territorial regime (taxes only sourced-income) and access treaty benefits?

These questions become even more complex when one looks at the multiple special tax regimes introduced worldwide to attract individuals (remote workers and digital nomads). The EU Tax Observatory has published a report on the "New Forms of Tax Competition in the European Union: an empirical investigation"[44]. This study identified three categories of special regimes for individuals: (i) "foreign source or worldwide income regimes", (ii) "schemes associated with income earned while performing a specific economic activity in the host country", and (iii) "schemes targeting pensioners".

In this context, the heavy reliance on physical presence for determining tax residence in the domestic legislations and in the tiebreaker rules poses significant obstacles to its application in a highly mobile world. Some authors believe that physical presence should remain as the main element for assessing tax residence, but they recognize the need for additional rules (for instance, deemed tax residence in special circumstances), focusing solely on objective aspects[45].

The complete elimination of the physical presence nexus seems unrealistic, but a certain degree of relativization is welcome. It is undeniable the need to modify or, at least, adapt the current residence rules both at the level of domestic law and that of double tax treaties (tiebreaker rules). The introduction of fictions, like the afore-mentioned "intermediate approach", might be a good alternative to minimize the problems herein exposed.

4.2. Allocation of taxing rights under double tax treaties (articles 15 and 17, OECD-MC)

International mobility of work challenges the nexus established in double tax treaties for the allocation of taxing rights among the Contracting States. Physical presence is not only an important nexus for determing tax residence and resolving dual-residence conflicts, but also for limiting the exercise of taxing rights in cross-border situations.

Articles 15 and 17 of the OECD-MC deals with employment income and income derived by entertainers and sportspersons, having as main nexus the "workplace" and the "place of performance", respectively. Both nexus require the physical presence of the employee, the entertainer or the sportsperson.

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[44] EU TAX OBSERVATORY. New Forms of Tax Competition. November 2021, Report no. 3. Available at: https://www.taxobservatory.eu/www-site/uploads/2021/11/EU-Tax-Observatory-Report-3-Tax-Competition-November-2021-3.pdf. Access on 18 Dec. 2024, p. 9-19.

[45] Cf. PISTONE, Pasquale; TENORE, Mario. General Report. *In*: KOFLER, Georg; *et al.* (eds.). *Mobility of Work*. European and International Tax Law and Policy Series. Amsterdam: IBFD, 2024, p. 5.

The first provision provides an exclusive allocation of taxing rights to the Residence State of the employee, unless the employment is exercised in the other Contracting State. In this case, the other State may tax the employment income. There is also an exception, according to which, even in such a case, the Residence State of the employee would have the exclusive taxing rights, provided that three negative and cumulative conditions are met (*e.g.* the employee is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned).

The second provision determines that the State where the performance takes place may tax income derived by a resident of a Contracting State as an entertainer, or a musician, or as a sportsperson. Such a performance must be in public, meaning that the person must be physically present in that State.

Nonetheless, employees, entertainers and sportspersons do not need to be physically present in a certain jurisdiction to exercise their activitives. An individual may work from home, hotel, coworking, which can be located in a different jurisdiction from that of the employer. An entertainer no longer has to physically perform a show to share his art with many countries (*e.g.* online live shows during the COVID-19 pandemic). It is also possible to imagine esports, in which athletes can perform from their bedrooms.

Apart from the situations above-mentioned, it is possible to identify five scenarios that help to understand the problems derived from the current nexus in light of article 15.

The first is a typical situation: a person is a resident and works in the same jurisdiction where the employer resides (State A). In this case, there might be exclusive taxation in the Residence State (first part of Article 15, paragraph 1). However, imagine that this same individual can work in a different jurisdiction (State B) for a certain period of time and for a specific project for which the second part of Article 15(1) will apply unless the negative and cumulative conditions are met.

A third scenario deals with an employee who is a resident of State A and exercises his employment in the same State where his employer resides (State B). In this case, the State in which the employment is exercised may tax since one of the negative conditions is not met (person paying is not a resident of the country where the employment is being performed). Such a scenario might also involve 'international hiring out of labour structures'[46].

Another example is the case of a post-COVID remote worker. An employee resident in State A works remotely for a company located in State B. He only works remotely from State A. In this example, State A would be entitled to tax the employment income, but State B would be precluded from taxing it.

[46] For further details on these structures, cf. PIGNATARI, Leonardo Thomaz. Article 15(2) of the OECD Model and the International Hiring-Out of Labour: New Criteria Required? *Bulletin for International Taxation*, v. 74, no. 8, 2020. Journal Articles & Opinion Pieces IBFD.

A final situation refers to digital nomads. They are individuals who are nationals of a particular state (A), but work remotely from different countries (C, D, E) while staying a very brief period of time in each of them. In this scenario, there might be taxation exclusively in their Residence State.

Early in the COVID-19 pandemic[47], the OECD examined a particular situation, in which the government subsidized the maintenance of an employee on a company's payroll. In this case, it understood that the income received by the employee must be attributed to the place where the employment was usually exercised.

In a second opportunity[48], the OECD looked at three different situations. The first case involves the granting of a wage subsidy and similar income received by crossborder workers who cannot carry out their work due to restrictions. In this scenario, taxation must occur in the place where the employee used to carry out his work. The second situation refers to a worker who is forced to remain in a jurisdiction where he is not a resident but previously held a job. In this case, it would be reasonable to disregard the additional days spent in that jurisdiction under exceptional circumstances for the purposes of the 183-day test.

The last scenario concerns an individual who works remotely from one jurisdiction for an employer who is resident in another jurisdiction. The OECD concluded that changes in the jurisdiction where an employee works might affect where his employment income is taxed. As such, it is possible that new taxing rights emerge in relation to the employee's income in other jurisdictions which can produce compliance costs for both the employer and the employee since payroll taxes are often withheld at source.

In this sense, one may wonder whether the nexus provided in articles 15 and 17 are adequate to the current reality or they need some sort of adaptation or full modification.

Hayes Holderness supports the location of the employer as a proxy for taxing income obtained by remote workers[49]. Pursuant to Holderness, sourcing income to the employer's location would not encourage remote workers to relocate to low-tax jurisdictions and thereby lead to inequitable treatment of workers earning the same income.

Giorgio Beretta proposes a single article ("Labour Income") on income earned by employees and independent service providers according to which the

[47] OECD. OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis. 3 April 2020. Available at: https://www.oecd.org/en/publications/oecd-secretariat-analysis-of-tax-treaties-and-the-impact-of-the-covid-19-crisis_947dcb01-en.html. Access on 18 Dec. 2024, p. 5.

[48] OECD. Updated guidance on tax treaties and the impact of the COVID-19 pandemic. 21 January 2021. Available at: https://www.oecd.org/en/publications/updated-guidance-on-tax-treaties-and-the-impact-of-the-covid-19-pandemic_df42be07-en.html. Access on 17 Dec. 2024, p. 15-21.

[49] HOLDERNESS, Hayes. Individual Home-Work Assignments for State Taxes. *Washington Law Review*, v. 98, 2023, p. 53-114.

employee's Residence State would have the primary taxing rights[50]. The Source State ("workplace"), in its turn, could tax such income if the individual is physically present in its territory for a period of at least 90 days in any twelve-month period beginning or ending in the fiscal year concerned. In addition, source taxation would take place if the individual performs his work activities through a PE or fixed base in that jurisdiction.

Pistone and Tenore comment four alternatives[51]. First, the place of exercise of the employment would be the "employee's ordinary place of work", which could be limited to mobile workers by amending the Commentaries to the OECD Model Tax Convention. Second, physical presence remains as the main criterion, but with the reduction of 183-day rule. Third, attribution of exclusive taxing powers to the Residence State of the employer, similar to what happens in Article 16 (Directors) and 19 (Government Service), with the possibility of small deviations. Finally, exclusive allocation to the Residence State of the employee, similar to the rule contained in Article 15(3)[52].

Individual taxation deserves more attention, since it directly impacts the population and composes most of the tax revenues in OECD countries[53]. The traditional workplace and place of performance are no longer the same. Tax authorities, taxpayers and international organizations cannot be indifferent to this reality.

5. Conclusion

International mobility of work poses inumerous challenges to corporate and individual taxation. The post-COVID world shows high levels of migration, countries are introducing special tax and non-tax regimes to attract workers, offering tax exemptions, and individuals are working from home or from jurisdictions different from that of their employers.

Without any intention to exhaust the matter, the present study examined these challenges from the perspectives of corporate and individual taxation.

Regarding corporate taxation, three challenges were examined.

First, the higher mobility of individual across the globe may affect legal entities's tax residence, inasmuch as one the main proxies consists of the place of effective management. For instance, the relocation and impossibility to travel of

[50] BERETTA, Giorgio. 'Work on the Move': Rethinking Taxation of Labour Income Under Tax Treaties. *International Tax Studies*, Issue 2, 2022, Journal Articles & Opinion Pieces IBFD.

[51] PISTONE, Pasquale; TENORE, Mario. General Report. *In*: KOFLER, Georg; *et al.* (eds.). *Mobility of Work*. European and International Tax Law and Policy Series. Amsterdam: IBFD, 2024, p. 60-63.

[52] Also supporting this alternative, cf. KOSTIKIDIS, Savvas. Nexus for Source Taxation of Mobile Individual Service Providers. *British Tax Review*, Issue 2, 2023. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4444617. Access on 18 Dec. 2024.

[53] OECD. Revenue Statistics 2024: Health Taxes in OECD Countries. Paris: OECD Publishing, 2024.

board members and senior executives may change the POEM and, consequently, the legal entity's residence, with implications under domestic law and double tax treaties.

Second, the possible characterization of a permanent establishment due to the remote work exercised by the employees. The question is whether an employee exercising his activities remotely from home (State different from the employer) constitutes a PE, triggering taxation therein. Under the relevant facts and circumstances of the case, especially the contractual arrangements, one shall examine the existence of a degree of permanence, if the home-office is at disposal of the enterprise, and if the employee exercises ancillary activities.

Third, legal entities may face problems with economic substance requirements. Many special regimes, tax rullings and agreements are conditioned to the existence of a minimum number of personnel in the jurisdiction or of an office. The fact that employees are working from home and the employer has no physical premises in that jurisdiction might block the access to those regimes or to treaty benefits.

Concernining individual taxation, there are two main challenges. First, the determination of tax residence according to an objective criteria connected with physical presence (*e.g.* 183-day test), which is particularly difficult in the case of digital nomads. In such a case, one alternative relies on the adoption of "*deemed residence rules*" for special circumstances. Second, the application of double tax treaties clauses (employment income and income derived by entertainers and sportspersons), which are also deeply dependent on the physical presence of the individual. These clauses should be modified in order to adapt them to a reality that no longer needs physical presence to exercise economic activities in a jurisdiction.

Therefore, international mobility of work affects many areas, including Tax Law. Taxpayers (legal entities and individuals), tax authorities and international organizations should direct their efforts to discuss the challenges above-mentioned, since, although the COVID-19 has thankfully ended, its lasting effects are still present and changed the way people and companies work.

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