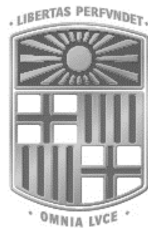

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The right to tax individuals

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Abstract

In this project will be analyzed who have the right to tax each individual. This right is strictly related with the fiscal residency as individuals pay for their worldwide income in their residence country. The project goes from the regulation of fiscal residency in the SPITL to the administration interpretation and jurisprudence of this regulation and finishing with the analysis of different real situations.

Key Words

SPITL – Spanish Personal Income Tax Law

MC OECD – Model of Convention OECD

Fiscal Residency

Double Taxation Agreements

Court Rulings

Index

1 - Introduction 6

2 - Fiscal Residency 8

2.1 - Fiscal Residency concept 8

2.2 - Article 9 SPITL 9

2.2.1 - 183 days criteria 9

2.2.2 - Economic Interests 11

2.2.3 - Vital Interests 12

3 - Fiscal Residency Matters 13

3.1 - Theoretical methods 14

3.1.1 - Exemption Method: 14

3.1.2 - Exemption with progressivity: 14

3.1.3 - Full credit method: 14

3.1.4 - Partial credit method: 14

3.1.5 - Deduction method: 14

3.2 - Double Taxation Agreements 15

3.3 - National law 16

3.4 - Allocation Principles 17

4 - Employment Income 18

4.1 - Expatriate workers 20

4.1.1 - Art 7.p). 20

4.1.2 Excess system 23

5 - Practical Examples of residency issues 24

5.1 - Cross-border workers 24

5.2 - COVID-19 29

5.3 - Managers 31

6 - Bibliography 38

7 - Webography 39

1 - Introduction

Nowadays, during the current crisis due to the disease COVID-19, the figure of the tax residence is much more critical. This crisis is improving the digitalization process, and following this trend, the physical presence is becoming an essential piece of our tax system. In 2019 only the 4,8% of the active population answer that use to telework. After the crisis, according to statistics from the Bank of Spain, around 30% of the jobs can be done by teleworking, and this percentage increases to a 50% when talking about qualified workplaces. [i]

This project aims to answer the question of who has the right to tax each individual and who not. This right is fundamental and shows how far is the current law from reality. The goal of any jurisdiction in terms of fiscal residency is to establish who effectively lives inside the boundaries of this one. Therefore, the current law has to be adapted to the present circumstances, where there is no relationship between physical residency and vital or economic interests. In my opinion, the physical residency may not be enough to consider somebody as a fiscal resident. The current technology able administrations to know where each individual generates each income. Therefore, the amendments to the law may be on the road to tax income in source countries. In this sense, the OECD institution is progressing, with the model of convention as a guideline for all jurisdictions.

In the meantime, jurisprudence plays a crucial role in interpreting and applying those outdated criteria.

The project is organized in four general parts, the first part analyze the Spanish fiscal residence with the national regulation and the problems generated by this legislation; the second part analyze the fiscal residency conflicts between different jurisdictions and the current ways to solve them; the third part talks about the intention to ease the globalization process by the

special consideration in Spanish internal law for the international workers; and the last part consist in solve different practical cases from a more pragmatic point of view.

Without further delay let start with the first part with the fiscal residency meaning.

2 - Fiscal Residency

2.1 - Fiscal Residency concept

One of the most important issues to be clear is, what means the concept of fiscal residency, and which are the implications of this fiscal residency. This project will focus on individuals' fiscal residence, and the criteria for individuals to be considered a fiscal resident in Spain appear in articles 8, 9, 10 of the Spanish Personal Income Tax Law (SPITL). First, let us see how some institutions define fiscal residency:

"Criterion of subjection to a tax power based on the effective location of an individual or a company in a given territory". (RAE, s.f.)[ii]

"For laypersons, it seems rather non-intuitive that your fiscal residency does not necessarily equal your residence in terms of immigration law. For example, you may have a residence permit for a country, but you might still not be a fiscal resident of this jurisdiction in that tax year. Very rarely is tax residence directly connected to nationality either.

So, how is fiscal residency defined? Mostly, it depends on the tax code of the country (or countries) where you have lived during the tax year in question. Either their tax code incorporates a legal definition, or their fiscal authorities apply various criteria to determine fiscal residency on a case-by-case basis." (Wolters Kluwer, 2014) [iii]

From these two definitions, fiscal residency is the country or territory where people are liable to be taxed.

The right to tax individuals

Once we have clear what fiscal residency is, we can understand when the Spanish Tax Jurisdiction considers individuals fiscal residents. Article 8 of the SPITL establishes two situations where taxpayers are liable to the Personal Income Tax (PIT). The first one, when individuals whose habitual residence is within the Spanish territory. The second one when individuals who are habitually resident abroad, due to any reason included in Article 10 of SPITL.

2.2 - Article 9 SPITL[iv]

The first situation is regulated in Article 9 of the SPITL, and there are two criteria and one presumption to be considered an individual whose habitual residence is within Spanish territory.

2.2.1 - 183 days criteria

The first criterion is to have stayed longer than 183 days in Spanish territory over the calendar year. Many dilemmas will be analyzed further due to the computation of these days. In these days are included the occasional absences, and the only way to justify that people are in another country is to provide the residence certificate of another country. At this point, we face two new concepts, (i) the concept of occasional absences and (ii) the concept of residence certificate.

The goal of occasional absences is to include holidays or weekends that people travel in the days computed as stayed in Spanish territory because there is a clear intention to return to Spain. The issue is that somebody can stay in another country for less than 183 days and therefore not be considered a fiscal resident in that other country, even staying less than 183 days in Spain.

Nowadays, people travel a lot, which means that individuals can be in more than two countries for less than 183 days in each of them. This hypothetical situation can lead to being less than 183 days in Spain but without having the residence certificate of those countries.

Moreover, that is not the only reason one cannot get a residence certificate from another country. Let us say that a taxpayer is more than 183 days in a country different from Spain; not all the countries have the same fiscal residence criteria; furthermore, not all of them have a residence certificate. However, imagine staying in a foreign country for more than 183 days, that country considers individuals who stay in that territory as fiscal residents, and has a residence certificate. That certificate can be provided in 2 years or more, as most administrations have long timeouts. We will see some situations where the Spanish fiscal administration has accepted other ways to prove those occasional absences. In countries labeled as tax havens, even if the taxpayer has that residence certificate, the administration can demand proof of the stay in that tax haven for each of the 183 days that have to have stayed.

For a better understanding, let us see what the administration considers as occasional absences. The Spanish law does not describe the concept of the occasional absence, so let us see the Spanish administration interpretation in the binding query V0198-16. This binding query is about a consultant who wants to be retired and is valuing the possibility of staying half a year in Colombia for family issues. To this situation, the Spanish administration settles the following:

"In the case consulted, and concerning the first criterion (permanence), it should be noted that as long as the consultant does not prove his tax residence in another country (Colombia), absences from Spanish territory will have a sporadic character for the determination of the tax residence of the same, who will continue to be considered a taxpayer of personal income tax, having to pay this tax for their worldwide income" (V198-2016, 2016).

At this point, is relevant to know what the Spanish administration considers as a valid proof of residence in another country. These criteria are settled in different binding queries as the V1891-17. "Tax residence abroad must be accredited by the person through the corresponding certificate of

residence issued by the competent tax authority of the State of residence." Once said, that seems a clear criterion, but let us fix some other specifications of the proof of these days outside the Spanish territory. The binding query V348/2017 establish the following "The residence of individuals is determined by **complete tax periods, the tax period coinciding with the calendar year, this is, from January 1 to December 31** of each year, without the possibility of splitting the tax period due to change of residence." (V348-2017, 2017). This is relevant because not all countries have the same fiscal period. For example, the United Kingdom fiscal year goes from April 6 to April 5 of the following year, which means that the certificate of residence, certificates that the individual is a fiscal resident in the United Kingdom for just a part of the natural year.

As we have seen, it is not an easy task to determine the fiscal residence of an individual. Since the year 2017, one judicial Sentence establishes a possibility to prove the stay in another country without a residence certificate. This is the judicial Sentence of the supreme court, nº 1850/2017 of 28 November 2017, which talks about the fiscal residence of the students who receive a scholarship of the "Instituto de Comercio Exterior (ICEX)" that entails a stay outside our country for more than 183 days. This Sentence establishes that a stay outside the Spanish territory for more than 183 days during the natural year due to a scholarship can not be treated as an occasional absence. Differently conclude the superior court of justice of Murcia, in the judicial Sentence of 24 September 2018, nº 615/2018. This judicial Sentence talks about a Thailand resident who returns to Spain to take care of a relative. The judicial Sentence concludes that even a resident of Thailand who had been in Spanish territory for more than 183 days will not be considered a Spanish fiscal resident because the goal of this stay was only the caring of a relative.

2.2.2 - Economic Interests

The second criterion is that they situate the main base or center of their activities or economic activities, directly or indirectly, in Spain. This is not a clear concept either. The center of

economic interests can be understood as (i) where there are their main investments, (ii) where there are their businesses, or (iii) where there are their properties. Let us see the actual jurisprudence in different situations.

- V2135-15: Following this binding query, the center of economic interests is considered where the individual has most of their income and more part of their real estate assets.

- SAN[1] 30 of march 2017, nº165/2017: This sentence argues that the art.9.1.b) of national Personal Income Tax legislation does not define what is the center or base of economic activities, but the art.72 of PIT legislation establishes what is considered the center of economic interests and is where the individual has the most part of income.
- STSJ[2] of Catalonia 29 of January 2004: This sentence considers where the individual has the most of their investments, where he has his businesses and administrates their properties.

As we see in these different court rulings, residence is a common issue in our tax system. However, there is a fundamental problem: it is a factual question that must be specified for each specific case by carrying out an individualized analysis.

2.2.3 - Vital Interests

The presumption when the dependent not legally separated spouse and underage children who are usually resident in Spain can be considered a Spanish fiscal resident but as a presumption accepts evidence to the contrary.

Let us put an example if you are an employee posted to another country with the wife and daughter in Spain, and you can prove the fiscal residency in another country, the only way to

[1] SAN – Sentencia Audiencia Nacional
[2] STSJ – Sentencia del Tribunal Superior de Justicia

be considered as a Spanish fiscal resident is having in Spain the main economic activities or economic interests. This example is treated in the binding query V1774-15.

Nevertheless, it is not as easy as it seems this presumption, due to the legislation say the following "dependent not legally separated spouse AND children". Considering this literally, the presumption can only be applied to individuals who have both, not legally separated spouse and children.

Article 10 SPITL

The second situation is set in Article 10 of the SPITL, when individuals with Spanish nationality have their usual residence abroad and are members of diplomatic missions, consular offices, or holders of public offices or civil servants carrying out official work abroad. With some exceptions. (OECD, s.f.)

When people are considered fiscal residents in Spain following this article, there are not many issues, due to, it is clear when somebody has been working abroad as a public official.

3 - Fiscal Residency Matters

The fiscal residency matters take place when the same individual is considered a fiscal resident in two different countries, according to the national law of each country.

Consequently, this individual can face double taxation international as a consequence of this fiscal residency matter, as this individual would be taxed as a fiscal resident in both countries.

At this point, is important to see the double taxation relief methods. Those methods are the methods that different countries use in order to solve the double taxation issue. It can be provided unilaterally (on its domestic legislation) or because of an agreement among the states. It is very important to provide any of these methods because, as we saw, individuals are taxed

The right to tax individuals

for their worldwide income in the country of fiscal residence, and, in the Spanish case, for their worldwide wealth as well. If none of these methods is provided, the foreign non-resident income tax law will create double taxation situations.

From a theoretical point of view the double taxation relief methods are the following:

3.1 - Theoretical methods[v]

3.1.1 - Exemption Method:

This method refuses to tax all income, which has been taxed abroad previously. When an individual generates income abroad, the resident country does not tax this income that has been taxed in this other state.

3.1.2 - Exemption with progressivity:

States that apply this method refuse to tax income obtained abroad but consider this income to apply the local tax rate to the local income.

3.1.3 - Full credit method:

Residence countries tax the individual for their worldwide income, but taxes paid abroad can be subtracted from tax liability without limitation.

3.1.4 - Partial credit method:

It follows the full credit method criteria, but taxes paid abroad can be subtracted from tax liability up to a limit. This limit is what foreign income would have paid in residence country.

3.1.5 - Deduction method:

Residence countries tax the individual for their worldwide income, but taxes paid abroad can be subtracted from the taxable base.

Those methods are the ones that countries chose to provide their tools to avoid double taxation. In the Spanish legislation environment, there are two principal double taxation relief

options the one provided in the Spanish national law and the one provided by bilateral agreements with other countries.

3.2 - Double Taxation Agreements

The double taxation agreements set different rules to set at which jurisdiction have the right to tax an individual. Those rules apply when there is a tax matter with an individual and two countries.

Nowadays Spain has 99 double taxation agreements in force and 5 in different stages of processing[vi]. The main goal of those agreements is to avoid the double taxation and the nowhere taxation, to distribute the right to tax among contracting states, to solve double residency and to ease change of information in tax matters.

First we will start with the double residency issue, and this issue is solved in the article 4 of the OECD model of convention. This article set the called "Tie break rules" which stablish an order of criteria's to determine the individual fiscal residence.

"2. Whereby 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." (OECD, s.f.)

Following these criteria, administrations can establish where individuals are taxed as fiscal residents and where are taxed as non-fiscal residents, avoiding most double taxation issues. Furthermore in this OECD model of convention, is not just set where people are fiscal residents. It establishes the right to tax for each country to each type of income. This is because even being a fiscal resident in a country, another country can tax as non-fiscal resident. There is where the allocation principles take place. We will see those allocation principles later.

3.3 - National law

In Spain, the double taxation relief method is in article 80 of the SPITL. This method is the partial credit method that we have seen. Taxes paid abroad can be subtracted from tax liability, up to the limit of what that income would be paid if obtained in Spain.

"Article 80. Deduction for international double taxation.

1. When the income of the taxpayer includes income or capital gains obtained and taxed abroad, the lesser of the following amounts will be deducted:

a) The effective amount paid abroad by reason of a tax of an identical or analogous nature to this tax or to the Non-Resident Income Tax on said income or capital gains.

b) The result of applying the effective average tax rate to the part of the taxable base taxed abroad." (Ley del Impuesto sobre la Renta de las Personas Físicas, Art. 80, 2006)

We can find different binding queries as the V2540-14, that in the same sense, say the following "This tax, in each of the states, will be determined by applying their internal regulations and corresponding in any case, the elimination of double taxation that the State of residence may generate." And the

binding query V1108-13 “regarding the elimination of double taxation that could be generated, we will apply the provisions of article 23 of the Hispano-Armenian Agreement, according to which Spain, after integrating these income into the taxable base, will admit the deduction, in the tax on the income of the recipient, of the tax paid in Armenia, without this deduction being able to exceed the part of the Spanish tax that would correspond.” Both binding queries establish that when double taxation occurs, the residence state has to provide an exemption method to avoid double taxation.

3.4 - Allocation Principles

Once we have seen when the Spanish administration considers an individual a fiscal resident and the exemption methods provided in the Spanish legal environment for the conflicts of double residency, the following step is to know if there is the possibility to be taxed only in Spain even not being a Spanish fiscal resident. This situation can occur due to the Allocation Principles, the principles that the different countries apply to tax for the different types of income, agreed in bilateral agreements.

In general terms, there are two types of Allocation Principles:

First, the residency principle gives a country the right to tax people who are fiscal residents in their country, unlimited for their worldwide income.

Second, the source principle gives a country the right to tax all the income that originated within their borders, no matter where they are fiscal residents.

Each country can set its own tax law, and this situation leads to double taxation issues. As we have seen, one way to solve this situation can be the Double Taxation Agreements, and these agreements set how to solve the fiscal residency issues and distribute the right to tax each type of income.

Those two principles are fundamental to understand where people are taxed for their different income types, as each type of income can be applied a different allocation principle.

The right to tax individuals

Considering the Model of Convention of the OECD there are the following different types of income:

1) Income from immovable property (Article 6)
2) Business Profits (Article 7)
3) Dividends (Article 10)
4) Interests (Article 11)
5) Royalties (Article 12)
6) Capital Gains (Article 13)
7) Income from employment (Article 15)
8) Entertainers and sportspersons (Article 17)

Each type of income has an allocation principle, residency, or source principle, and some of them have limitations in this source or residency principles.

4 - Employment Income

Article 15 of the OECD Model of Convention is where we find the employment income regulation in terms of localization. On the one hand, this article establishes as a general rule that wages, salaries, and other similar remuneration 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 unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration derived therefrom may be taxed in that other State.

As it says, "MAY" be taxed, which means that it can be taxed in both states. This means that the contracting State can apply some of the Double Taxation Exemption Methods that we have seen.

Moreover, this article sets a special rule for the remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State. This income shall be taxable only in the resident state when the following conditions are met:

a) The individual is present in the source country for a period not exceeding to 183 days.

The expression "exercised in the other Contracting State" it will be understood that it requires physical presence. This is specified in different Double Taxation Agreements as the Spain and Dominican Republic agreement, or in the OECD commentary of the article 15 paragraph 1.1. "Employment is exercised in the place where the employee is physically present when performing the activities for which the employment income is paid." And paragraph 2.5 "the days of physical presence method. The application of this method is straightforward as the individual is either present in a country or he is not. The presence could also relatively easily be documented by the taxpayer when evidence is required by the tax authorities. Under this method the following days are included in the calculation: part of a day, day of arrival, day of departure and all other days spent inside the State of activity such as Saturdays and Sundays, national holidays, holidays…"

b) The remuneration is paid by, or on behalf of, an employer who is not a resident of the other State

The commentaries of the article 15 in the paragraph 2 6.1 defines the concept employer with the different domestic legislation interpretations "law definitions of the term in some countries, e.g. where an employer is defined as a person liable for a wage tax". The residency of the employer, will be set following the article 4.2 rules of the OCDE Model of Convention.

c) The remuneration is not borne by a permanent establishment, which the employer has in the other State.

In order to understand when a remuneration is borne or not borne by a permanent establishment (PE), we have to know what is considered a PE. The interpretation of a PE is set in the article 5 of the OECD Model of Convention and it says the following "For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on." And specifically a place of management, a branch, an office, a factory, a workshop and a mine are considered permanent establishments.

4.1 - Expatriate workers

As we have seen the double taxation relief methods and the allocation principle for the employment income determined by the OECD Model of Convention, now we will see how is treated this employment income of the expatriate's workers in the national legislation.

4.1.1 - Art 7.p).

The article 7.p). of the SPITL establish an exemption method for the employment income obtained abroad. This exemption has some rules that have to be fulfilled: (i) Works must be carried out for a company not resident in Spain or a permanent establishment located abroad, (ii) The territory where the job is carried out, applies a tax of identical or similar nature and this territory is not considered as a tax haven. We can find this regulation in the RD 439/2007 of March 30, wherein his article 6 specifies more about the exemption. One of the other essential things to be considered is that this exemption is incompatible with the one regulated in Article 9.A.3.b) of RD 439/2007 of March 30.

i. Works must be carried out for a company not resident in Spain or a permanent establishment located abroad.

The job must be performed abroad, and a displacement of the worker outside Spain is required in order to fulfill this requirement, which means that even the work is done for a foreign company but is performed in Spanish territory, the exemption will not apply.[vii] In order to have a better understanding of what is the administration criteria followed by the Spanish administration to consider which works are effectively performed abroad for non-resident companies, we will see different binding queries.

Following the binding query V1556-09, even a multinational company sends their workers abroad for commercial purposes, which is not considered as performed for a non-resident company.

Even when working for a non-resident company and performing these works abroad, if these works are not beneficial, the non-resident company will not be valid to apply for the exemption. This is set in a binding query as the V1566-09 saying the following “conditions required in article 7 p) of the SPITL are not met, as they are income from work performed outside the Spanish territory but not for a non-resident company due to this works are done in the Spanish company self-interest.”

ii. The territory where the job is carried out, applies a tax of identical or similar nature, and this territory is not considered as a tax haven.

This requirement can be a bit ambiguous because it just requires a similar tax in the tax system of the foreign country even if the tax-payer has or not have to pay for it. This is argued by the administration in the query 0222-05 “regarding the requirement of the application of a similar or analogous nature tax, the rule does not require that the income corresponding to work provided abroad have to be taxed in the country

which it is provided, it is only enforceable that a tax of the mentioned characteristics is applied in said country or territory.”

Furthermore, this requirement will be considered as fulfilled when the foreign country has a DTA with Spain with an exchange of information following article 6 of the RD 439/2007 of march 30..

Regarding the determination of exempt income, when the worker makes several trips abroad, in order to quantify the part of his income from work that is exempt, he should only take into account the days that the worker has been posted abroad. Suppose work trips abroad are not specifically remunerated. In that case, it is possible to apply a proportional distribution criterion to determine the amount of income earned for work carried out abroad, taking into account the total number of days of the year, not just business days.

For a better understanding, let’s put an example. Think in a public worker, as a civil guard, serving in Afghanistan under the command of EUROPOL. This worker is remunerated for 3 different concepts.

a. The current wage for the public position.
b. The compensation for participation in peacekeeping missions.
c. Europol wage for the word carried out in Afghanistan.

Part of those remunerations exempt.

a. Will be exempt the part corresponding with the proportion of days work abroad.
b. Exempt following article 7.o) of the SPIT
c. This part will be full exempt as is remuneration obtained specifically for the works done abroad.

The sum of a. and b. will be exempt up to the limit of 60.100 euros.

4.1.2 Excess system

Another treatment or incentive for expatriate workers is the Excess

System. We can find this system in Article 9.A.3.b) of RD 439/2007 of March 30. This system is an option, which expatriate workers can choose, and if you choose this system, you can not apply the Expatriate System that we have seen. The Excess that the employees with destination abroad receive over the total remuneration that they would obtain for salaries, wages, seniority, extraordinary payments, including benefits, family assistance or any other concept, due to position, employment, category, or profession in the event of being in Spain, will be considered as exempt diets.

Unlike the Expatriates System, the excess system does not set any limitation or requirement for this exemption. That is why it will be a good option to analyze each employee's situation with destination abroad in comparison with the exemption of article 7 p). Imagine an expatriate worker who not met all the requirements of the Expatriates System, as the tax system with similar taxation, this worker will not be able to apply the Expatriates System but will be able to opt for the Excess System. Moreover, imagine a situation where the worker met all article 7.p) requirements, but a considerable part of this worker salary is directly related to working abroad. In this situation, when this amount surpasses 60.100 euros would be better to opt for the Excess System. It is relevant to remember that those exemptions are regulated in the national law, and workers have to be considered fiscal residents in Spain to apply the Expatriate or Excess system. If a worker is not considered a fiscal resident in Spain, will be taxed in Spain as a non-resident, and those exemption options will not be applicable.

5 - Practical Examples of residency issues

Nowadays, there are many double fiscal residency issues. In this final part of the project, I will set different hypothetical situations in other to solve them with the knowledge developed during the project.

5.1 - Cross-border workers

Cross-border workers are one of the oldest tax residency conflicts. This issue is not due to technological development. First of all, let introduce the legal definition of cross-border workers. This definition appears in the Council Regulation (EEC) Nº 1408/71 of June 14, 1971 *"the expression "cross-border worker" designates any worker employed or self-employed who carry out their activity professional in the territory of a Member State and resides in the territory of another Member State, to which it returns in principle every day or at least once a week."*[viii] If we look at the map we can appreciate that Spain have borders with five different countries:

1) Portugal
2) France (V2989-18)
3) Morocco
4) Andorra
5) United Kingdom (Gibraltar)

The right to tax individuals

We can consider these countries in two different groups, which have a special regulation for cross-border workers and those that do not have this particular regulation. Therefore, these workers are taxed following the general rules.

1) **The first hypothetical situation is a worker who works in a Portuguese Company but lives in Spain. He resides in Spain, moving daily from their place of residence to his workplace. The question to this situation is where this employment income must be taxed.** [ix]

   In order to know how and where this income is taxed, first, we have to see where this worker is considered as a fiscal resident. For this reason, we will go first to the national legislation, article 9 of SPITL. In this situation, the worker will be considered as a fiscal residence following the presence testx as he will return every day to Spain but can be considered as a Portuguese fiscal resident applying the Portugal national law. If that occurs, this worker will face a double residency conflict between the two states. Therefore this situation will be solved with the MC OECD. Before we talked about Article 4 of MC OCDE, States base their agreements on this MC. Article 4 of the bilateral agreement between Spain and Portugal establishes residency tie break rules. Considering this worker is considered as fiscal resident in both countries, Portugal and Spain, we need to use these tike break rules. As the tie break rules have to be applied in order, the first solution to the double residency problem is set in Article 4.2.a)

Article 4.2.a) bilateral agreement between Spain and Portugal

"a) She will be considered a resident ***exclusively*** *of the State where she has a* ***permanent home at her disposal****; If you have a permanent home available to you in both States, you will be considered a*

resident exclusively of the State with which you have the closest personal and economic relationships (center of vital interests)."

Therefore, will be a fiscal resident in the country where that worker has a permanent disposal home. As the cross-border worker resides in Spain, it has a disposal home there. Considering that this worker does not have any disposal home in Portugal, following the tie break rules will be considered a Spanish fiscal resident.

The second important thing to consider is the type of income. We have seen that the OECD Model of convention distributes the right to tax among the contracting States, where there is a resident country established by Article 4, and the other State, the source country. In this case, the income is considered employment income. The article section 1 general rule for employment income set that this income will only be taxed in the residence country. Below is the special rule, which says the following "except when these works are carried out in the other contracting state". This special rule applies the source principle, the principle in which income is taxed where obtained. In our situation, if the special rule applies, the income would be taxed in Portugal, as Portugal is the source country. Moreover, this article provides exceptions to the special rule, and the relevant exception in our situation is in article 15, section 4.

Article 15.4 bilateral agreement between Spain and Portugal

"Notwithstanding the provisions in paragraphs 1 and 2, the remuneration obtained because of a job carried out in a Contracting State by a Cross-Border worker, that is, who has his habitual residence in the other Contracting State to which he usually returns each day, only may be taxed in that other State."

This article section will apply in our situation, as the example worker is moving daily from their residence country to the source country. So, this income will only be taxed in the residence country, even those are generated in Portugal, in our case, Spain. [xi]

2) **Second hypothetical situation, a worker who works in a Spanish Company but lives in France and does not have any other income. He resides in France, moving daily from their place of residence to his workplace. The question to this situation is where this employment income must be taxed**. [xii]

In this situation applying the Spanish national law, the worker will be considered as a fiscal resident in Spain applying the economic interests' criteria of Article 9.1.b) of SPITL. Moreover, we will consider that France's national law considers this worker as a French fiscal resident as that worker lives there. Anew will take place in a double residency conflict. To solve the conflict, will apply article 4 of the bilateral agreement between Spain and France. Applying this article, the first criteria are that the individual will be a fiscal resident in the country with a disposal home. Considering he lives in France and doesnot have any other disposal home, it will be considered as a Fiscal resident in France. Nevertheless, not always the resident country has the right to tax, and we have to be aware to apply the regulation of employment income of the bilateral agreement. Article 15 is which regulates the employment income in the bilateral agreement among those States. Following the general rule of that article, the income can only be taxed in the residence country, in that case, France. As we have seen, that's not the only rule. The special rule applies the source principle, taxing income where it is carried out. In the hypothetical case, Spain. Nevertheless, the twelfth protocol says the following:

Protocol 12 bilateral agreement between France and Spain

> *"12. Notwithstanding **the provisions of paragraphs 1 and 2 of Article 15**, as long as no new provisions are agreed between the Contracting States, the provisions of paragraph 4 of the Convention of June 27, 1973 between Spain and France to avoid double taxation on income and wealth taxes, **the text of which is the following, will remain in force**:*
>
> *"4. Cross-border workers who justify this quality by means of the border document created by particular agreement between the Contracting States **are subject to tax**, for the wages, salaries and other remuneration they receive for this concept, **only in the Contracting State of which they are residents.** "*
>
> *The competent authorities of the Contracting States shall determine, when necessary, the manner in which the preceding provisions shall be applied and shall agree in a special way, if necessary, on the supporting document as a border letter, for the purposes of these provisions.."*

As we are talking about a cross-border worker, this protocol will apply and income can only be subject to tax in the residence country, France.

3) **The last hypothetical situation is a worker who works in a Moroccan or Andorran Company but lives in Spain. Resides in Spain moving daily from their place of residence to his workplace. The question to this situation is where this employment income must be taxed.**

The bilateral agreement between these two countries and Spain does not have any special consideration for the Cross-Border Workers. This is the reason why we will treat those two situations in the same example. Anew, the first thing we have to take into account is the corresponding national laws. The Spanish law will consider this worker as a fiscal resident applying the presence test of Article 9.1.a) SPITL. Andorra and Morocco can consider this worker as a fiscal resident in their jurisdictions as the works are carried out there. If that occurs, it will face a conflict of fiscal residency between Spain and those countries. To solve the conflict, we resort

to the corresponding bilateral agreements. Following Article 4.2.a) of bilateral agreements, the individual will be considered a fiscal resident in the country where he has a permanent disposal home. In the hypothetical case, this disposal home is in Spain as the worker moves daily from Spain to his workplace.

Once set where the worker is considered as a fiscal resident, it is vital to analyze if the employment income is taxed in the residence country or not. Employment income is regulated in Article 15 of the bilateral agreement with Morocco and Article 14 of the bilateral agreement with Andorra. As we saw in the previous examples, this income is taxed by the general rule in the residence country. However, the special rule applies the source principle, taxing this income where those are generated. Therefore by the special rule, those incomes will exclusively be taxed in Andorra or Morocco.

5.2 - COVID-19

Since the approval of the state of alarm and the entry into force of the Royal Decree 463/2020of March 14, Spanish citizens have been seriously limited with some fundamental rights, such as the right to freedom of movement. In the same way, the global pandemic caused by COVID-19, the Government was also forced to close the land borders on March 16, subsequently restricting entry to Spain through ports and airports.

In the tax field, the main issue that COVID-19 brought regarding tax residence are conflicts of residence between two jurisdictions for two principal reasons:[xiii]

1. The situation where a non-resident is forced to stay in our country without the possibility to return to his residence.

2. The situation of a Spanish worker non-resident in Spain, that returns to Spain during the pandemic situation but with the intention to return to his fiscal residence country when the situation ends. This situation mostly occurs in cross-border workers situation.

It is clear that the conflict will rely on applying the different countries' presence test, which considers the days spent in their territory to consider an individual as a fiscal resident, depending on whether they take these days into account.

As we had seen before, Spain is a clear example of these countries because it has a very restrictive regulation when determining the days computed in its jurisdiction.

Due to the exceptional situation, there is not much administrative doctrine in this regard. The firsts administration answers in binding queries go in the same sense as the V1983-20. That binding query considers the lockdowns days included in the computation of the 183 days..

"The days spent in Spain for the couple, due to the state of alarm, would be counted, so if they remained more than 183 days in Spanish territory in 2020, they would be considered as personal income tax taxpayers." (V1983-2020, 2020).

For the two conflict situations, the OECD established one guidance for each situation. This guidance is considered "soft law" as are not mandatory for States. The guidance are the following:

"31. In the first scenario, it is unlikely that the person would acquire residence status in the country where the person is temporarily because of extraordinary circumstances. There are however rules in domestic legislation deeming a person to be a resident if he or she is present in the country for a certain number of days. But even if the person becomes a resident under such rules, if a tax treaty is applicable, the person would not be a resident of that country for purposes of the tax treaty. **Such a temporary dislocation should therefore have no tax implications**.

32. In the second scenario, it is again unlikely that the person would regain residence status for being temporarily and exceptionally in the previous home country. But even if the person is or becomes a resident under

such rules, if a tax treaty is applicable, **the person would not become a resident of that country under the tax treaty due to such temporary dislocation**."

The OECD point of view is clear, and it is in accordance with common sense, considering that a person would not become a resident of a country due to temporary dislocation. That's why recently the Spanish administration answer a binding query referring to this OECD interpretation. The binding query is the V0862-21 where conclude the following:

"**This Center shares the assessments made in the report of the OECD Secretariat** regarding the possible application of the decisive criteria to resolve the conflicts of residence of 4.2 MOECD in these circumstances and, therefore, understands that in cases such as the one consulted, **of a natural person who has been confined in Spanish territory due to COVID-19** and could be considered a tax resident in Spain in accordance with article 9 of the LIRPF, the criteria set forth in article 4.2 of the Convention (in this case, Hispanic- Moroccan) make it unlikely that said person will finally be considered a resident in Spain instead of in the other State (Morocco in this case), being able to resolve, in any case, the conflict of double residence."

So nowadays, with the current accordance between the OECD and the Spanish Administration interpretation, the days stayed in another country due to the state of alarm must not be decisive in order to consider an individual as a fiscal resident.

5.3 - Managers

Managers are the first workers who began to travel for business, for that reason, there is also a lot of administrative doctrine and jurisprudence around them. In this case, I will not focus on where they are considered fiscal residents, I will focus on the taxation treatment of managers' fiscal residents in Spain. During this project was analyzed the treatment of the expatriate workers. As managers of multinational enterprises usually travel a lot, the consideration of these workers will be crucial.

The right to tax individuals

A worker who uses to travel for work reasons can profit from one of the two regimes analyzed before. Remember, those regimes were the Expatriate System and the Excess system. The Expatriate system is regulated in Article 7.p) of SPIT and in Article 6 of Royal Decree 439/2007, of March 30. We have seen all the requirements for the application of this tax benefit, but now the important one is the required for intragroup services. Managers use to travel, but they keep working for the same company, so those services will be considered intragroup services and have to produce advantage or utility to the recipient entity, the entity located abroad. The purpose of this system is a way to incentive globalization and facilitate international mobilization..

Article 7.p).1º SPITL

"1.º That said works are carried out for a company or entity not resident in Spain or a permanent establishment located abroad. In particular, when the entity receiving the work **is linked to the employee's employer entity or the one in which it provides its services**, it will be understood that the work has been carried out for the non-resident entity when in accordance with the provisions of section 5 of article 16 of the consolidated text of the Corporation Tax Law, it may be considered that an intragroup service has been provided to the non-resident entity **because the service mentioned above produces or may produce advantage or utility to the recipient entity**."

This is very important, and at the same time very difficult to determine when the works carried abroad provide a clear advantage for the company located abroad. As there is a lot of jurisprudence, I made a summary of the most recent one considering the difference between them.

The two sides in the court rulings interpretation are the following ones:

a) The one which considers that the works carried abroad by managers provide an advantage for the non-resident company, and therefore allow them to apply the exemption for Expatriate workers.

The right to tax individuals

b) The one which considers that the works carried abroad do not provide and specific advantage to the non-resident company and therefore deny the Exemption of the income generated for those works.

Obviously, the court rulings interpretation depends on each case's characteristics, and we cannot apply a general rule to determine if the Exemption is applicable or not..

The side a) appears in different Judicial Sentence as the Sentence of the national court of February 19 of 2020 which conclude the following:

"For all these reasons, in the opinion of the Chamber, the criterion maintained by the Administration, based on the consultations of the General Directorate of Taxes, implies a limitation of the income from work that can benefit from the exemption that the norm does not provide. And, consequently, we consider that **the sole circumstance of being the recipients of the returns are members of the Board of Directors of the recurring entity is not enough to deny the application of the exemption**, provided that the other requirements established in the standard are met, and in particular that the work performed abroad, in the case of intra-group operations, produce a profit or advantage for the recipient entity, which in this case is not questioned.

It should be noted, however, that in the assumption we are analyzing, most of the services provided abroad by the CEOs can be framed within **executive and management functions and not merely deliberative**; and without forgetting that the Supreme Court pointed out that article 7 p) **does not contemplate what the nature of the work should be, and in particular, it does not prohibit that it is supervision or coordination work**, and that the beneficiary of the work is, not only the non-resident entity, but also, and among others, the employer entity of the recipient of the work income (or the one in which it provides its services)"

From this court ruling we can see that the nature of the job could not be a reason to deny the exemption and that the executive and management functions provide an advantage for the foreign entity, allowing managers to apply for the exemption.

Other court rulings in the same sense are the Sentence 231-2020 of the Madrid high court of justice of March 2, 2020, the Sentence 789-2020 of the Asturias high court of justice of December 16,2020.

The right to tax individuals

This side could be logical, as the purpose of the exemption is the incentive to globalization, and clearly, these workers are contributing to this globalization. Now will see the side b) interpretations with two court rulings:

Sentence 703-2020 high court of Justice Madrid of November 12,2020:

"that the actor **performed general management, advisory and consulting functions** in the contract management process for IBM subsidiaries in Western Europe, Eastern Europe, the Middle East, Africa and Pakistan (…)

He fully qualified him within the functions of his position, so **it cannot be appreciated that said jobs, developed abroad, have provided the added value legally required, since they were implicit in his functions as director responsible for internal processes and operations in those countries.**"

Sentence 322-2020 high court of Justice Madrid of November 12,2020:

"In this sense, we cannot ignore that the tax incentive we are dealing with aims to internationalize human capital residing in Spain, reducing the tax burden on those who, while remaining residents, temporarily move to work abroad. **This internationalization does not occur in the case of proceedings, in which the appellant occasionally travels abroad to perform the functions of his job**."

The two main arguments made by the administration to deny the exemption, are (i) the fact that the works carried abroad are included in the functions of his job, and (ii) the fact that the internationalization which is the purpose of the exemption does not occur in the case which the worker occasionally travels abroad to perform functions of his job.

The argument of the duration of the displacements is refuted in sentences such as the Sentence 231-2020 of Madrid high court of justice of March 2, 2020.

"The fact that the duration of the applicant's trips abroad was short is of no relevance whatsoever for the purpose of denying the application of the exemption in question."

The right to tax individuals

There are many doubtful interpretations of the law, but these are evident situations where the purpose of the administration is not the spirit of the law and is just the collection intention.

6 – Conclusions

The Spanish national law is not clear in order to consider who is a Spanish fiscal resident and who not. This is due to the old SPIT law, which is clearly disconnected from the present reality. The broad criteria of the Spanish legislation generate many problems with other fiscal systems that require the agreement between the two countries involved, in other to do not harm the tax-payer. This problem is solved by the bilateral agreements that Spain has signed with the different countries, following the model of the OECD MC.

Nowadays, globalization is a fact, and the different laws must be adapted to this situation, legislating from a global point of view, considering other countries legislations. In this project, we saw some intentions from the Spanish legislation to this global fact, with different special tax systems for international workers, who usually leave from one country to another for work reasons. At the same time, we have seen the many problems that those special systems have and the unequal treatment from one type of worker to others.

The current pandemic situation had shown States that the current legislations are not useful for the current circumstances, and these circumstances will be harder in the future to recover in individual countries legislation. The need of a global regulation is increasing, and the jurisdictions will need to agree in global rules. Law is not the unique regulation tool, jurisprudence and administration queries set the guidelines of how to apply this law. Therefore, those legal bodies need to enhance in the same way. During this project, we have seen the difference between the law intention and the interpretation of the judicial and administrative bodies, which figure out the tax collection effort instead of the economic or social goal behind each law.

To conclude, the trend to this global world will convert countries into “companies” who offer a life product, with different climate, economic, political, and fiscal characteristics; in

which everyone will decide to live or not, work or not and therefore contribute or not. From an economic point of view, a flexible fiscal environment will be a competitive advantage in front of other countries which have a more aggressive environment. That is why fiscal residence is one of the key elements for the future of Spain’s economic development.

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