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In Search of the Digital Nomad – Rethinking the Taxation of Employment Income under Tax Treaties

In this article, the author raises major policy questions, which emanate from the new digital economy setting, regarding the current normative framework for delineating taxation rights over employment income in our tax treaties, namely article 15 of the OECD/UN Models (2017). The author questions our reliance on the tax residence of individuals as the safe anchor for attributing taxation prerogatives, as well as our understanding of how and where employment is exercised. Furthermore, the author shows that labour law developments are making our tax treaty rules, which are currently based on the belief in the existence of a common international understanding of the concepts of employment and employer (employment relationship), increasingly inoperable. Based on the provided analysis, the author suggests amendments to article 15 of the OECD/UN Models (2017) to improve their alignment with the new digital reality.

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The notion that Uber in London is a mosaic of 30,000 small businesses linked by a common “platform” is to our minds faintly ridiculous.¹

1. Introduction

The quest to align the international tax order with the challenges posed by the digital economy has so far mostly focused on solving issues involving incorporated structures.² What is somehow escaping the attention of the tax treaty policymakers is the fact that it is not only in the domain of companies that we have lost our ability to rely on physical presence as the principle factor determining the nexus with a particular jurisdiction for tax purposes³ or where we are struggling to characterize the payments being made in the context of new business models.⁴ Article 15 of the OECD/UN Models (2017), quite similarly to article 5 of

1. UK: ET, 28 Oct. 2016, *Uber B.V., Uber London LTD, Uber, Britannia LTD v. Asslam, Farrar, Dawson and others*, no. 2202550/2015, para. 90, available at <https://www.judiciary.gov.uk/wp-content/uploads/2016/10/asslam-and-farrar-v-uber-reasons-20161028.pdf>.

2. E.g. the *Action 1 Final Report* (OECD/G20, *Addressing the Tax Challenges of the Digital Economy – Action 1 Final Report*) (OECD 2015), International Organizations’ Documentation IBFD [hereinafter *Action 1 Final Report*] is ultimately devoted to the income taxation of companies and does not address in any significant detail potential personal income taxation issues. The *Interim Report 2018* mentions the possible impact of the digitalization of the economy on personal income tax and social security systems in OECD countries:

468. The size of the gig and sharing economy activity is not yet well measured ... However, these types of business models also raise a number of policy issues as regards fair competition with other providers, as well as the impacts on social protections, pensions, consumer protection, and government revenues; in particular taxation and social security contributions. For example, across OECD countries a growing number of workers can earn income outside the traditional employee-employer relationship. While this trend has been in place for some time in various OECD countries, it has met with renewed focus recently due to continued developments in the digital economy, which have ushered in an increasing provision of self-employed workers through multi-sided platforms.
[...]

473. Many governments and courts are already considering these issues. The evolution of such platforms and the nature of the contracts between the platforms and their users may, for example, provide greater opportunities for activities to be structured in ways that minimise tax liabilities and reduce the tax base.

474. The impact of platforms on the changing taxable status of economic actors across different forms of employment merits further examination. The OECD stands ready to deliver further work on this topic. Initial steps have already been taken to analyse tax incentives for platforms and more generally employers, to hire labour through nonstandard labour contracts, and for employees to offer labour services either as a selfemployed person or through a closely-held corporation.

See OECD/G20, *Tax Challenges Arising from Digitalization – Interim Report 2018* (OECD 2018), International Organizations’ Documentation IBFD [hereinafter *Interim Report 2018*].

3. M. Kumar Singh, *Taxing E-Commerce on the Basis of Permanent Establishment: Critical Evaluation*, 42 *Intertax* 5, p. 327 (2014); R. Petrucci & V. Koukouloti, *The European Commission’s Proposal on Corporate Taxation and Significant Digital Presence: A Preliminary Assessment*, 58 *Eur. Taxn.* 9, sec. 3.2. (2018), *Journals IBFD*. It should be noted that the growing elusiveness of physical presence as the grounds for establishing jurisdiction is not a solely tax phenomenon. Within the conflict of laws scholarship it has long been recognized that traditional approaches for solving jurisdictional conflicts are becoming obsolete in the face of our new digital reality. See L. Lessig, *The Zones of Cyberspace*, 48 *Stanford Law Review* 5, pp. 1403-1411 (1996); U. Khol, *Eggs, Jurisdictions, and the Internet*, 51 *International & Comparative Law Quarterly* 3, pp. 556-582 (2002); D.J.B. Svantesson, *Private International Law and the Internet* (Kluwer 2016). Furthermore, from the perspective of conflict of employment law, the cross-border mobility of workers, particularly in environments that have done away with administrative obstacles which crucially impede the ability to exercise employment in various jurisdictions, such as the European Union, has raised numerous complex issues as to what to base jurisdiction and determine applicable law. For more on this particular issue, see U. Grušić, *The European Private International Law of Employment* (Cambridge University Press 2015).

4. OECD/G20, *Action 1 Final Report*, *supra* n. 2, at pp. 104-106; Committee of Experts on International Cooperation in Tax Matters, Fifteenth Session, 11 Oct. 2017, E/C.18/2017/CRP.22, p. 20, available at <http://>

the respective Models,⁵ resonates of the past. In reading the permanent establishment (PE) definition found in tax treaties, one cannot resist the impression that one is standing before a world of huge blast furnaces, steel mills and coal, sirens leading to thousands of workers going through huge factory courtyards. Provisions governing the taxation of employment income in tax treaties offer the same sensation. We are living in an age where labour lawyers are hotly debating the essential concepts, such as who is an employer and who is an employee.⁶ Failure to answer these questions means that we cannot conclude whether a particular remuneration represents payment in respect of employment, an exercise without which the application of the provisions governing the delineation of taxation rights over employment income becomes impossible. Furthermore, as in the case of article 5 of the OECD/UN Models (2017), article 15 is fundamentally reliant on the concept of the physical presence of the taxpayer (the employee) in the source state. However, in the modern world, employment in many professions can be exercised from any place that allows an internet connection, while some countries are already providing administrative solutions to facilitate some form of *virtual* nexus to the ever-growing population of digital nomads (e.g. e-residency in Estonia).⁷

From the perspective of analysing the effects of the digital economy on the treatment of income generated by individuals under double tax treaties, employment income is the obvi-

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www.un.org/esa/ffd/wp-content/uploads/2017/10/15STM_CRP22_-Digital-Economy.pdf; M. Olbert & C. Spengel, *International Taxation in the Digital Economy: Challenge Accepted?*, 9 World Tax J. 1, sec. 2.2.2. (2017), Journals IBFD; P. Valente, *Digital Revolution. Tax Revolution?*, 72 Bull. Intl. Taxn. 4a/Special Issue (2018), Journals IBFD.

5. *OECD Model Tax Convention on Income and on Capital* (21 Nov. 2017), Models IBFD [hereinafter *OECD Model* (2017)]; *United Nations Model Double Taxation Convention between Developed and Developing Countries* (1 Jan. 2017), Models IBFD [hereinafter *UN Model* (2017)].

6. J. Prassl, *The Concept of Employer* (Oxford University Press 2015); S. D. Harris & A. B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent" Worker*, The Hamilton Project, Discussion Paper 2015-10 (2015), available at https://onlabor.org/wp-content/uploads/2016/10/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf; V. De Stefano, *The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdfunding, and Labor Protection in the "Gig-Economy"*, 37 Comp. Lab. L. & Pol'y J. 3 (2015-2016); K. Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in Modern Economy*, 96 B.U. L. Rev. 5 (2016); B. Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 Harv. L. & Pol'y Rev. 2 (2016); M.A. Cherry & A. Aloisi, *"Dependent Contractors" in the Gig Economy: A Comparative Approach*, 66 American Univ. L. Rev. 3 (2017); J. Prassl, *Pimlico Plumbers, Uber Drivers, Cycle Couriers, and Court Translators: Who is a Worker?*, 33 Law Q. Rev. (2017); K. G. Dau-Schmidt, *The Impact of the Emerging Technologies on the Employment Relationship: New Gigs for Labor and Employment Law*, 2017 U. Chi. Legal. F. 4 (2018); M-C. Bureau & P. Dieuaide, *Institutional Change and Transformations in Labour and Employment Standards: An Analysis of "Grey Zones"*, 24 Transfer: European Review of Labour and Research 3 (2018). The *Interim Report 2018* also notes that:

471. With the rise of the gig and sharing economies, changes in the mix of taxable status in the economy – for example from employee to self-employed or incorporated – can have important consequences. When changes in taxable status occur, different rules may apply for example on deductions and thresholds for income tax purposes and social security contributions. When these changes occur across significant proportions of the working population, this will have implications for government revenues as well generate other public policy concerns, including from loss of certain employment rights. These changes may either arise from individuals voluntarily choosing different work patterns or as a result of changing preferences of employers, at least in some areas of their business, or both. The growth in the use of platforms in certain sectors may already be acting to reduce the relative number of standard employment contracts.

See OECD/G20, *Interim Report 2018*, *supra* n. 2, at para. 471.

7. Republic of Estonia E-residency, *The new digital nation – latest version*, available at <https://e-resident.gov.ee/> (accessed 17 Apr. 2019).

ous choice, as it is still by far the most dominant source of people’s income worldwide.⁸ This article attempts to determine the main tax-relevant obstacles emanating from both of the outlined developments (the ever-increasing mobility of the global workforce and the growing elusiveness of the concepts of employer, employee and employment) and challenges the effectiveness of the current solution provided by virtue of the provisions of article 15 of the OECD/UN Models (2017). In order to accomplish the stated goal, we must align the most relevant dilemmas troubling labour law theory and practice with the tax treaty provisions dealing with the treatment of employment income, as well as test the soundness of the basic premises on which they are based and propose ways by which to improve some of the determined deficiencies in the current normative framework in tax treaties.

2. Taxation of Employment Income under Tax Treaties – A General Overview

2.1. *The general rule for taxing employment income – Article 15(1) of the OECD/UN Models (2017)*

Article 15(1) of the OECD Model (2017)⁹ states:

Subject to the provisions of Articles 16, 18 and 19, salaries, wages 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. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

An identical provision can be found in article 15(1) of the UN Model (2017), as well as in article 14(1) of the US Model (2016).¹⁰

Four key questions must be answered in order to interpret the cited norm:

- What is employment?
- What sort of remuneration (salaries, wages) is derived in respect of employment?
- When is employment exercised in the other contracting state?
- When employment is exercised in the other contracting state, how is the remuneration derived therefrom determined?

The Commentary on Article 15(1) of the OECD Model (2017) is mute on the question of what constitutes employment and merely notes that “the issue of whether or not services are provided in the exercise of an employment may sometimes give rise to difficulties which are discussed in paragraphs 8.1 ff”.¹¹

While the second question is inherently connected with the first (i.e. in order to know what sort of remuneration is derived in respect of employment, we first have to determine what employment is),¹² the third is answered quite resolutely by the Commentary, and we can

8. The Congressional Budget Office report on *The Distribution of Household Income and Federal Taxes, 2013*, published in June 2016, states that labour income makes up by far the largest portion of household income in the United States – more than 70%, approximately. See Congressional Budget Office, *The Distribution of Household Income and Federal Taxes, 2013* (CBO 2016), available at <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51361-householdincomefedtaxesonecol.pdf>.

9. Art. 15(1) *OECD Model* (2017).

10. *United States Model Income Tax Convention* (17 Feb. 2016), Models IBFD [hereinafter *US Model* (2016)].

11. Art. 15(1) *OECD Model* (2017).

12. In art. 4.1(r) *ILADT Multilateral Model Tax Convention for Latin America for the Avoidance of Double Taxation* (2012), Models IBFD (hereinafter *ILADT Model* (2012)), the term salary is defined in a somewhat

conclude that it is the situs of the employee that ultimately determines the source state's taxation rights:

Employment is exercised in the place where the employee is physically present when performing the activities for which the employment income is paid.¹³

Finally, the Commentary approaches the issue of attributing remuneration to the exercise of employment in some detail.¹⁴

2.2. Exception from the general rule for taxing employment income – Article 15(2) and (3) of the OECD/UN Models (2017)

Article 15(2) of the OECD/UN Models (2017), which provides for the exception from the general rule on the taxation of employment income, introduces a three-pronged cumulative test that, if met, denies the source state the right to tax employment income derived by a resident of the other contracting state from the exercise of their employment in its territory. The first of the three cumulative conditions begins with a temporal limitation:

Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:

a) the recipient 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 Commentary on the OECD Model (2017) offers vague instruction on the rationale behind the 183-day rule in article 15(2)(a). An exercise of such employment is deemed short term, which, provided the employer does not have a more permanent presence in the source state, may allow one to conclude that it does not justify the imposition of all the administrative obligations that would follow from the imposition of the taxation prerogatives of the source state.¹⁵

In article 9(1) of the ILADT Model we find, in the norm itself, a rather clear explanation of the purpose of the 183-day threshold in allocating taxation rights with respect to employment income:

.....
different way: "the term 'salary' includes any direct or indirect remuneration for work". Thus, similarly to the *OECD/UN Models*, under the *ILADT Model* (2012), in order to determine the proper interpretation of the term "salary", one must first fully grasp the meaning of the term "work".

13. Id.
14. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 15* paras. 2.2-2.16 (27 Nov. 2017), Model IBFD [hereinafter *OECD Model: Commentary on Article 15*].

15. Para. 16.2 *OECD Model: Commentary on Article 15* (2017). K. Dziurdz & F. Pötgens, *Cross-Border Short Term Employment*, 68 Bull. Intl. Taxn. 8, p. 405 (2014), Journals IBFD; K. Dziurdz, *Article 15 of the OECD Model: The 183-Day Rule and the Meaning of "Borne by the Permanent Establishment"*, 67 Bull. Intl. Taxn. 3, sec. 2 (2013), Journals IBFD. The OECD Report *The 183 Day Rule: Some Problems of Application and Interpretation* states that:

6. However, it is important, for practical reasons, to maintain this rule since, even though domestic legislation allows a number of Member countries to tax any activities, however short, exercised on their territory, in practice it may not be possible to tax people working for a short duration, either because of lack of information or because the costs of collection would be exorbitant compared to the return. It is also important for the taxpayer who finds it easier to deal with only one tax system, i.e. that of his State of residence with which he is familiar. The State of residence should, nonetheless, be in a position to exercise its taxing right when the State of activity abandons its own right.

See OECD, *The 183 Day Rule: Some Problems of Application and Interpretation* (OECD 1991), International Organizations' Documentation IBFD.

Income derived by a resident of a Contracting State in respect of an employment exercised in any of the other Contracting States shall be taxable only in the State where the activity is exercised, unless the activity has a temporary nature where the presence does not exceed an aggregate of 183 days in a year, or when the person renders a service to his residence or nationality State (including its political or administrative sub-divisions), in which case such income shall be taxed only in the State of residence of the employee.¹⁶

Thus, in summary, the established view in international taxation is that short-term activities in respect of employment (of a temporary nature) should be subject to tax only in the residence state of the employee, while the 183-day threshold serves to delineate temporary from a more permanent presence warranting source state taxation.¹⁷

The following two cumulative conditions are essentially related to the deductibility of the remuneration derived in respect of employment from the taxable basis of the employer in the source state:

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

c) the remuneration is not borne by a permanent establishment which the employer has in the other State.¹⁸

The conditions from article 15(2)(b) and (c) of the respective OECD and UN Models (2017) obviously demand that the term “employer” must be defined in order to properly apply them, while the Commentary somehow uses this opportunity to fill in the evident gap with respect to article 15(1) and the term “employment”, namely in the Commentary on Article 15(2) of the OECD Model (2017), which offers an elaborate description of the concept of employment, to which the analysis of the interconnected term “employer” will be added.¹⁹ However, it is difficult to disagree with those who conclude that the principal aim of the respective provisions of the Commentary is to provide guidance on the meaning of the term “employer” as used in article 15(2)(b) and (c).²⁰

The provisions of the OECD/UN Models (2017) dedicated to employment income end with a specific rule that corresponds with the solutions provided in article 8 of the respective Models (Shipping, Inland Waterways Transport and Air Transport):

Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic, or aboard a boat

16. Art. 9(1) *ILADT Model* (2012).

17. The 183-day test is used for identical purposes in art. 14 *UN Model* when delineating taxation rights in the case of independent personal services. *United Nations Model Double Taxation Convention between Developed and Developing Countries: Commentary on Article 14*, para. 6 (1 Jan. 2017), Models IBFD, expressly makes the link between the 183 days criterion used in art. 14(1)(b) and the one used in art. 15(2)(a). Para. 28 *OECD Model: Commentary on Article 5* also relies, as a rule of thumb, on the 6-month threshold to determine if the temporal aspect of the condition that the place of business be fixed for a PE to exist is met.

18. Para. 6.2 *OECD Model: Commentary on Article 15* (2017).

19. *Id.*, at paras. 8.1-8.28.

20. F. Pötgens, *Proposed Changes to the Commentary on Art. 15(2) of the OECD Model and their Effect on the Interpretation of “Employer” for Treaty Purposes*, 61 Bull. Intl Taxn. 11, sec. 2 (2007), Journals IBFD. Furthermore, all of the examples provided in paras. 8.16-8.27 *OECD Model: Commentary on Article 15* deal with situations where the individual is undoubtedly employed with the issue being which of the two companies will be treated as his or her employer for the purposes of art. 15(2)(b) and (c).

engaged in inland waterways transport, may be taxed in the Contracting State in which the place of effective management of the enterprise is situated.²¹

2.3. *The foundational principles of employment income taxation under article 15 of the OECD/UN Models (2017)*

From a policy perspective, one may conclude that article 15 of the OECD/UN Models is based on an unquestionable reliance on the primacy of the residence state taxation principle or, to be more precise, on the belief that an individual's tax residence is sufficient proof of their fundamental relationship with a particular contracting state, which justifies the enjoyment of tax treaty benefits and the limitation of source state taxation rights.²² The source state link is established by virtue of the physical presence of an individual when performing their employment and is conditioned on additional factors that testify as to the existence of a more substantial relationship with the state in which employment is exercised.²³ These additional factors are either the passing of a temporal threshold of physical presence in the source state or, in the absence of such permanence of presence, the yielding of taxation rights to the state where employment is exercised if the remuneration for such employment could be used to lower the tax basis of the employer subject to taxation in that state.²⁴ On the other hand, the interpretation of article 15 of the OECD Model (as well as of the UN Model and thus the vast majority of double tax treaties in the world today) is fundamentally related to the clear definition of the terms "employment" and "employer". As no Model Convention contains an independent definition of the aforementioned terms, we are faced with a policy choice of basing the interpretation of a tax law provision on concepts that emanate from other bodies of law and that may not have an independent meaning in tax law at all.

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21. For more on the peculiarities of art. 15(3) *OECD Model*, see L. De Broe & J. Luts, *Taxation of Remuneration from Employment aboard a Ship or Aircraft Operated in International Traffic: Interpretation Issues under Article 15(3) of the OECD Model*, 71 Bull. Intl. Taxn. 3-4 (2017), Journals IBFD.
 22. In the case of, e.g., dividends, interest and royalties, the reliance on the residence of the recipient of the income is not unconditional. The source state taxation rights are limited, provided an additional test, that of beneficial ownership, is passed. The *US Model* (2016) goes a step further and demands that for the purposes of enjoying the more beneficial treatment in the source state with respect to the taxation of dividends, interest and royalties, a resident of the contracting state who is the beneficial owner of such income must also meet the standard of being a qualified person. See art. 22 *US Model* (2016). Art. 29(1) to (7) *OECD Model* (which has not been the primary choice of most countries party to the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (7 June 2017), Treaties IBFD [hereinafter *Multilateral Instrument* (2017)]) also introduces the standard of a *qualified person* for the purposes of being entitled to enjoy the benefits of a double taxation treaty, and while it elaborates the meeting of this standard in detail when it comes to legal entities, an individual is always a qualified person.
 23. Waldburger notes that the *OECD Model: Commentary* is silent as to the policy considerations that the principle of taxation in the country where employment is exercised is based on and mentions that doctrine often links taxation rights over the employment income with the deductibility of the remuneration paid to the employee ("The country which bears these costs shall be compensated by the taxing rights for these remunerations"). R. Waldburger, *Income from Employment (Article 15 OECD Model Convention)*, in *Source versus Residence Problems Arising from the Allocation of Taxing Rights in Tax Treaty Law and Possible Alternatives* p. 186 (M. Lang, P. Pistone, J. Schuch & C. Staringer eds., Kluwer Law International 2008). However, he also rightly points to the fact that the rules present in art. 15 *OECD Model* are not fully consistent with such a doctrinaire position and offers a view with which we would have to side: "Alternatively one could argue that no policy considerations at all are behind Article 15, but that the taxing rights should naturally lie in the country in which the employee is physically present for performing its work". Id., at p. 187.
 24. F. Pötgens, *The Netherlands Supreme Court and Remuneration Borne by the Permanent Establishment – Third Time Lucky!*, 48 Eur. Taxn 12, p. 655 (2008), Journals IBFD.

3. The Residence Illusion

Graetz delivered quite a harsh assessment of the modern international taxation system:

We have been blinded by adherence to inadequate principles and remain wedded to outdated concepts. As a result, we have no sound basis for pronouncing our international tax policy satisfactory or unsatisfactory.²⁵

The soundness of using an individual's tax residence to delineate taxation rights under double taxation treaties, one of the cornerstones of not only the global tax treaty network but of international taxation in general, may be discussed from two perspectives. On the one hand, one may question whether or not the elements used in determining residence still reflect the impartial criteria that always demonstrate a person's strong and deep personal links with a particular jurisdiction. However, such a debate would result in an inquiry into the very instincts that underpin our belief that family and permanent home are the true and ultimate testaments of such a connection. On the other hand, a perhaps less challenging quest may be to see whether or not individual income taxation is and should be free from the concerns regarding the sole reliance on tax residence for granting treaty benefits. Such concerns have existed for some time in the domain of taxing legal entities and have duly become part of the general discourse on double taxation treaties. An examination of the anti-abuse provisions of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (hereinafter Multilateral Instrument)²⁶ reveals that, in the case of the simplified limitation-on-benefits clause, the resident individual is always a qualified person, while companies must meet additional conditions (i.e. besides being a resident of the contracting state) in order to enjoy the benefits of a double taxation treaty.²⁷ From the perspective of the Multilateral Instrument's principal purpose test,²⁸ it would be rather difficult, particularly if customary reasoning is applied, to deem an individual's decision to settle in a particular place or use that place as perhaps just one of the more permanent bases in the course of their global travels as having been driven by the desire to obtain the benefits granted by double taxation treaties. However, there would be no hesitation in using the sharp blade of the principal purpose test on a company that has been established in a particular jurisdiction by its non-residents solely for the purpose of channelling dividend payments under a more beneficial withholding tax regime than the one existing between the respective residence state of the investors and the source state of the dividends.²⁹

In this article's further deliberations, the author will attempt to show that, from the perspective of employment income taxation (and more besides), reliance on the preeminence of the residence state's taxation rights (and the use of the situs element to identify the source state) is becoming not just outdated, but practically Stone Age.³⁰

25. M.J. Graetz, *The David Tillinghast Lecture: Taxing International Income – Inadequate Principles, Outdated Concepts, and Unsatisfactory Policy*, 54 Tax L. Rev., p. 269 (2000/2001).

26. *Multilateral Instrument* (2017).

27. *Id.*, at art. 7(9)(a).

28. *Id.*, at art. 7(1).

29. B. Kuźniacki, *The Principal Purpose Test (PPT) in BEPS Action 6 and the MLI: Exploring Challenges Arising from Its Legal Implementation and Practical Application*, 10 World Tax J. 2, secs. 2.3.3. and 2.4.3.2. (2018), Journals IBFD.

30. Joanna Wheeler states that "maybe the true problem is that too much is expected of the residence definition". J.C. Wheeler, *The Missing Keystone of Income Tax Treaties*, 3 World Tax J. 2, sec. 2.3.4. (2011), Journals IBFD.

3.1. *The residence market – Individuals welcome!*

Residence is no longer the impartial criterion derived from the consequences of one's personal circumstances, which are not essentially tax driven. Dagan notes that tax residence is increasingly becoming a traded commodity:

Globalization, however, is significantly transforming the nature of sovereignty. If we zoom out to the international level, we will find that the all-powerful sovereign, as traditionally envisioned, is but one of two-hundred or so sovereigns that compete with one another. Competition increasingly is turning states into market players that offer their goods and services to potential "customers." In this market for sovereignty goods, states compete for capital and residents, while (at least some) individuals "shop around" for sovereign-provided privileges, public goods, and social and cultural goods.

[...]

Two forces steer this market. First and foremost is the mobility of residents and capital; second is the ability of constituents/stakeholders (often with the encouragement of governments) to unbundle the "packages" of sovereignty. Consider mobility first: taxpayers – both individuals and businesses – are becoming increasingly mobile and can therefore select from alternative jurisdictions to relocate their places of residence, investments, business activities, or even citizenship [...] Instead, the tax policymaking process has gradually transformed under competition, and states increasingly operate as recruiters of mobile investments and residents from other states, while at the same time striving to retain their own residents and investments.³¹

While corporations enjoy an increasingly borderless world, countries continue to rely on immigration laws to curtail the global mobility of individuals.³² However, a brief stroll along the main street of any major world city today would show that those very norms have not managed to stem the tide of humanity, and that perhaps the sole existing effective obstacles to mobility are natural barriers insurmountable to most.³³

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31. T. Dagan, *International Tax and Global Justice*, 18 *Theoretical Inquiries L. 1*, sec. II.B (2017). Hongler and Pistone provide a similar assessment:
the ontological validity of residence as a nexus to the taxing jurisdiction is gradually losing importance, since international tax planning has proved that in some cases, very limited functions are performed in such country, as frequently happens within multinational groups of companies.
See P. Hongler & P. Pistone, *Blueprints for a New PE Nexus to Tax Business Income in the Era of the Digital Economy*, sec. 3.2, Working Paper (IBFD 2015), White Papers IBFD. Confirmations of such conclusions can be evidenced in numerous jurisdictions. E.g. G. Beretta, *From Worldwide to Territorial Taxation: Is Italy Now an Attractive Destination for Migrating Individuals?*, 71 *Bull. Intl. Taxn.* 8, secs. 1 and 2 (2017), *Journals IBFD*; W.H. See, *The Territoriality Principle in the World of the OECD/G20 Base Erosion and Profit Shifting Initiative: The Cases of Hong Kong and Singapore – Part I*, 71 *Bull. Intl. Taxn.* 1, secs. 1 and 2 (2017), *Journals IBFD*.
32. See R.J. Vann, *Taxing International Business Income: Hard Boiled Wonderland and the End of the World*, 2 *World Tax J.* 3, sec. 2.3.2. (2010), *Journals IBFD*. Avi-Yonah notes that "in our globalization, however, labor faces immigration laws that restrict its mobility, while capital is free to move anywhere it wants at the click of mouse". R.S. Avi-Yonah, *And Yet it Moves: Taxation and Labor Mobility in the Twenty-First Century*, in *Taxation and Migration* p. 46 (R.S. Avi-Yonah & J. Slemrod eds., Kluwer Law International 2015).
33. For example, the most recent migration crisis wherein millions of people from the Middle East and Central Asia, as well as sub-Saharan Africa, endure immeasurable hardships to reach the safety of Europe was and is avoided by the United States of America (a natural and reasonable choice for many) by the simple fact that the vastness of the Atlantic Ocean is too much of an obstacle to master. The same conclusion can be made with respect to Europe in the case of migrations of people from Central and South America. Eurostat reports that 2 million non-EU citizens migrated to the European Union just in 2016, while foreign nationals make up 7.5% of the overall population of the EU Member States. See Eurostat, *Statistics Explained: Migration and migrant population statistics*, available at https://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics#Migration_flows:_2_million_non-EU_immigrant (accessed 17 April 2019). In the United States, the foreign-born

However, one may be surprised to learn that citizenship and place of residence are increasingly being offered for sale by numerous jurisdictions in the world, including the most powerful and affluent.

The World Economic Forum reports that:

A new global industry has been booming in recent years, as countries offer people the chance to acquire citizenship or residency. Economic programmes are allowing foreigners to legitimately purchase citizenship or a residency permit – in return for a substantial investment.³⁴

A 2015 International Monetary Fund Working Paper lists Antigua and Barbuda, Australia, Bulgaria, Canada, Cyprus, Dominica, France, Greece, Grenada, Hungary, Ireland, Latvia, Malta, New Zealand, Portugal, St. Kitts and Nevis, Singapore, Spain, the United Kingdom and the United States as jurisdictions offering their citizenship and/or residency in return for investment, with the respective costs ranging from the rather modest EUR 35,000 for Latvian residency to EUR 10 million for the equivalent French one.³⁵ More recently, in October 2018, the OECD stated that it has analysed more than 100 citizenship and/or residence-by-investment schemes offered by countries committed to the Common Reporting Standard (CRS) and found that 28 of them, provided by 17 respective jurisdictions,³⁶ posed a high risk for the integrity of the CRS.³⁷

While it should be noted that neither citizenship nor residency, in the immigration law sense of the term, can be immediately equated with tax residence, which may open doors to the adopted (or perhaps a more appropriate term is “purchased”) country’s network of double tax treaties, permanent residence will in practice often lead to unlimited tax liability and tax residence. For example, possession of a permanent residence permit and/or registration of the address of permanent residence with civic authorities will lead to tax residence

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population numbers more than 40 million. See United States Census Bureau, *Current Population Survey – 2016 Detailed Tables*, available at <https://www.census.gov/data/tables/2016/demo/foreign-born/cps-2016.html> (accessed 17 Apr. 2019).

34. J. Myers, *Countries where you can buy citizenship*, World Economic Forum (28 July 2016), available at <https://www.weforum.org/agenda/2016/07/countries-selling-citizenship/>.

35. X. Xu, A. Al-Ashram & J. Gold, *Too Much of a Good Thing? Prudent Management of Inflows under Economic Citizenship Programs*, p. 5, International Monetary Fund Working Paper WP/15/93 (15 May 1993), available at <https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Too-Much-of-a-Good-Thing-Prudent-Management-of-Inflows-under-Economic-Citizenship-Programs-42884>. The list of countries is not exhaustive and neither is the variety of “products” on offer. E.g. the official application portal of the Thailand Privilege Card Company Limited, a subsidiary of the Ministry of Tourism and Sport of the Government of Thailand, available at <https://thailandelite-direct.com/>, contains various residency programmes for individuals, some of which are coupled with additional courtesies, such as airport express service through immigration and VIP lounge access, government concierge services or free annual health checks.

36. Antigua and Barbuda, Bahamas, Bahrain, Barbados, Cyprus, Dominica, Grenada, Malaysia, Malta, Panama, Qatar, St. Kitts and Nevis, Santa Lucia, Seychelles, Turks and Caicos Islands, United Arab Emirates and Vanuatu.

37. OECD, *Residence/Citizenship by investment schemes* (20 Nov. 2018), available at <http://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/residence-citizenship-by-investment/> (accessed 23 Oct. 2018).

in Belgium,³⁸ Brazil,³⁹ Finland,⁴⁰ Hungary,⁴¹ Italy,⁴² Serbia⁴³ and the United States,⁴⁴ to name but a few.

From the opposite position, the current reliance on the concept of domicile, which uses archaic notions of personal connection to establish a person's links with a particular place,⁴⁵ or legal concepts that allow easy concealment of these connections,⁴⁶ may offer the protection of a country's tax residence and its network of double taxation treaties to those individuals who no longer have any strong personal links with their territory. For example, many countries will accept possession of a permanent home in their territory as qualification for tax residency. A person living and registered at their parents' address will, as a rule, meet the threshold of having a permanent home in the jurisdiction of the parents' house, and will thus be deemed a tax resident of that jurisdiction. However, an individual's residence status will often continue to hold, by fiat, even after the person has moved to another jurisdiction, unless specific steps are taken to deregister from the original address.⁴⁷ Furthermore, if no sufficient links are established with an alternative jurisdiction, something that is becoming increasingly possible in our mobile world, it could well be that no other country will attempt to dispute the tax prerogatives of the original residence state. Thus, while well-known non-domiciled residence status schemes that focus essentially on luring high-net-worth individuals to one's territory are far from new,⁴⁸ they may also represent, as will be shown in detail in the subsequent sections of this article, attempts to introduce or, more precisely, keep rules allowing the effective tax "anchoring" of a country's citizens who are venturing out into the world, not as a means to primarily protect the tax basis of the country, but fundamentally as a form of tax incentive for the increasingly mobile professional population.

Surprisingly, the issue of commodifying citizenship or residence of individuals (in the immigration law sense of the term) appears very rarely in the academic sources of tax law, while Christians concludes that:

A surge of innovative tax residence programs designed to facilitate favorable tax outcomes consistent with international rules and norms might therefore be an (unintended) outcome of the recent push for global cooperation and coordination on international tax.

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38. S. Gelyuyckens, *Belgium - Individual Taxation* sec. 1., Country Analyses IBFD (accessed 23 Oct. 2018).
 39. V. Arruda Ferreira, *Brazil - Individual Taxation* sec. 1., Country Analyses IBFD (accessed 23 Oct. 2018).
 40. L. Ambagtsheer-Pakarinen, *Finland - Individual Taxation* sec. 1., Country Analyses IBFD (accessed 23 Oct. 2018).
 41. L. Torma, *Hungary - Individual Taxation* sec. 1., Country Analyses IBFD (accessed 23 Oct. 2018).
 42. F. Avella, *Italy - Individual Taxation* sec. 1., Country Analyses IBFD (accessed 23 Oct. 2018).
 43. D. Popović & G. Ilić-Popov, *Serbia - Individual Taxation* sec. 1., Country Analyses IBFD (accessed 23 Oct. 2018).
 44. J.G. Rienstra, *United States - Individual Taxation* sec. 1., Country Analyses IBFD (accessed 23 Oct. 2018).
 45. For example, in Ireland or the United Kingdom, a person's domicile is the place where his father is domiciled. See S. Ruane, *Ireland - Individual Taxation* sec. 1., Country Analyses IBFD (accessed 23 Oct. 2018); B.R. Obuoforibo, *United Kingdom - Individual Taxation* sec. 1., Country Analyses IBFD (accessed 23 Oct. 2018).
 46. E.g., residence based on the address registered with public authorities as the permanent home of an individual.
 47. To use the words of Joanna Wheeler of IBFD in one of her useful comments to the author, it is as if we are relying on the place where a person's childhood toys are kept for the purposes of asserting unlimited tax liability.
 48. While remittance-based taxation associated with non-domiciled status is ancient in origin and cannot be considered to have been devised initially as an instrument for luring high-net-worth individuals to one's territory, its continued application by jurisdictions such as the United Kingdom can, at present, be seen with some difficulty as being anything but such an instrument.

[...]

Lack of certainty does not seem to bother governments in terms of generosity and frequency of new program offers.⁴⁹

From the perspective of employment income taxation, one may argue that the citizenship and residence-by-investment schemes are of limited relevance, as they are targeted at high-net-worth individuals.⁵⁰ In other words, only the top capital-owning class can take advantage of them, and employment income is not its primary source of wealth. However, such a contention fails to take an important factor into account, namely the fact that the so-called transnational capitalist class is viewed by some sociologists in broader terms than merely that of the owners of capital. Sklair divides the transnational capitalist class into four categories:

- owners and controllers of transnational corporations and their affiliates;
- globalizing bureaucrats and politicians;
- globalizing professionals; and
- consumerist elites (merchants and media).⁵¹

Even if there were disagreement regarding the extent to which globalizing professionals dominate the transnational capitalist class, it would be difficult to disprove the conclusion that skilled individuals have been fully immersed in the globalized economy, where borders are considered an obsolete obstacle.⁵² In essence, global trends are such that they are driving countries to enable the mobility of not only capital but also people, and provide tax incentives for people to move to and settle in their territories. Such regimes, purposefully designed to attract the highly skilled, are becoming increasingly popular and are operating in numerous jurisdictions.⁵³ In other words, the “hunger” for human capital is leading an increasing number of governments to divert their focus from high-net-worth individuals to those possessing valued knowledge and skills.⁵⁴ Thus, citizenship and residency schemes, including tax residency schemes, are not only destined for exponential growth, but are also set to focus more and more on those who essentially earn their living by providing dependent or independent services. Such a conclusion is further supported by the rather troubling demographic projections of most developed and many developing countries.

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49. A. Christians, *Jumping the Line or Out of the Net? Tax and the Immigration Investor*, 88 Tax Notes Int'l, p. 360 (23 Oct. 2017).
 50. For more on the special tax regimes offered to high-net-worth individuals, see G. Beretta, *Mobility of Individuals after BEPS: The Persistent Conflict between Jurisdictions*, 72 Bull. Intl. Taxn. 7, sec. 3.2. (2018), Journals IBFD.
 51. L. Sklair, *The transnational capitalist class and the discourse of globalization*, 14 Cambridge Review of International Affairs 1, p. 69 (2000). See also L. Sklair, *The Transitional Capitalist Class* (Blackwell 2001); W. Carroll, *The Making of a Transnational Capitalist Class: Corporate Power in the 21st Century* (Zed Books 2010).
 52. V. Colic-Peisker, *Free floating in the cosmopolis? Exploring the identity-belonging of transnational knowledge workers*, 10 Global Networks 4, pp. 468-469 (2010).
 53. S.I. Mutis, *Can Special Attraction Regimes Lead to Treaty Residence?*, 72 Bull. Intl. Taxn. 9 (2018), Journals IBFD.
 54. From an anecdotal perspective, the legislation used today to attract highly skilled professionals to Spain was introduced initially for the purposes of giving Spanish football clubs an edge in soliciting the best players and was accordingly named the Beckham Law, after the English football player who joined Real Madrid. See Á.J. Juárez, *Chapter 23: Spain*, in *Taxation of Entertainers and Sportspersons Performing Abroad* sec. 23.1.1.1.4.2. (G. Maisto ed., IBFD 2016), Online Books IBFD.

3.2. *The sedentary mindset*

In much of the world, the tax residence of individuals is determined either by virtue of the physical presence test and/or by weighting the personal circumstances of the taxpayer, with greater weight given to the country of principle abode (or deemed principle abode, such as the domicile) or the one to which the individual's family ties are closest.⁵⁵ And it is here that we see the age-old logic, stemming from the Neolithic era, because we take for granted a sedentary lifestyle, which requires some form of permanence in one particular geographical spot (our home). We assume, based on thousands of years of experience, that those of us endowed with families will not be able to travel freely, but will always be, as if by a magnet, drawn to our loved ones.⁵⁶ In other words, we still view the existence of the family (understood in its reproductive role, i.e. children and other dependents) as a given.

Some 10,000 years ago, our ancestors began to exchange the freedom of a foraging lifestyle for the surety of agriculture.⁵⁷ This led to the Neolithic demographic transition or, to be more precise, the agricultural demographic transition, which resulted in an explosive human population increase in comparison with the previous periods.⁵⁸ However, since the 18th century, most modern nations have been experiencing a demographic decline, in which both the fertility and mortality rate have been falling.⁵⁹ The population statistics in contemporary Europe are quite troubling. Eurostat reports that approximately 2.5 million fewer children were born per annum in the EU Members States in the second decade of the 21st century than in the 1960s. The number of live births per woman in the European Union is far below the replacement level required to keep the population size constant in the absence of migration. Finally, the mean age of mothers at the birth of their first child has now crossed over into the fourth decade, and most births are increasingly of an only child.⁶⁰ The data is similar for most developed countries.⁶¹

Two notable conclusions can be drawn from the grim population data on the world's most prosperous nations. First, while it is perhaps still too early to dismiss the family as one of the

55. R.S. Avi-Yonah, *International Tax as International Law – An Analysis of the International Tax Regime* p. 23 (Cambridge University Press 2007).

56. It is interesting to note that love between spouses is also a rather novel concept, as for most of history marriage was not particularly endowed with this element. Actually, for most of history, the very idea of combining love and marriage seemed absurd. For more on the history of marriage, see S. Coontz, *Marriage, a History: How Love Conquered Marriage* (Penguin Publishing Group 2006). Gupta states in his study of marriage within the traditional Indian society:

One is intrigued by the cultural pattern in India where the family is characterized by arranged marriage. Infatuation as well as romantic love, though, is reported quite in abundance in the literature, sacred books, and scriptures, yet is not thought to be an element in the prospective marital alliance.

G.R. Gupta, *Love, Arranged Marriage, and the Indian Social Structure*, 7 *Journal of Comparative Family Studies* 1, pp. 76-77 (1976).

57. J.P. Bocquet-Appel, *The Demographic Impact of the Agricultural System in Human History*, 50 *Current Anthropology* 5, p. 659 (2009).

58. J.P. Bocquet-Appel, *The Agricultural Demographic Transition During and After the Agricultural Inventions*, 54 *Current Anthropology* 2, p. 497 (2011).

59. L. Newson, T. Postmes, S.E.G. Lea & P. Webly, *Why Are Modern Families Small? Toward an Evolutionary and Cultural Explanation for the Demographic Transition*, 9 *Personality and Social Psychology Review* 4, pp. 361-362 (2005).

60. Eurostat, *Statistics Explained: Fertility statistics*, available at http://ec.europa.eu/eurostat/statistics-explained/index.php/Fertility_statistics (accessed 29 Oct. 2018).

61. OECD Social Policy Division, Directorate of Employment, *Labour and Social Affairs, SF2.3: Age of mothers at childbirth and age-specific fertility* (OECD 2018), available at http://www.oecd.org/els/soc/SF_2_3_Age_mothers_childbirth.pdf.

most relevant connecting factors in determining residence, it does stand to reason that it is worth contemplating the possible alternatives or at least variations. Second, as the mean age for bearing children rises, the family as a connecting factor declines in relevance, at least for a considerable portion of a person's productive life. For much of human history and until but a century ago (and alas in many parts of the globe still), individuals, especially women, were married off as soon as they reached puberty.⁶² In other words, a person was always part of a family – either the one they were born into or the one joined by virtue of marriage. Solitary life was not only uncommon but also often impossible, either due to objective, environment-driven obstacles or societal and culturally imposed ones. In addition, our modern world is forcing us to re-examine the very concept of the nuclear family, as single parenting or childbirth out of wedlock is becoming more common throughout the world.⁶³

Essentially, our brave new digital world is one in which instincts developed over thousands of years are leading us astray. We placed our trust in the idea of a tax residence of individuals because we believed that the criteria used in defining this concept were unassailable. But, as time reveals these to be increasingly under threat, so it reveals the corresponding threat to the very concept of residence, which should, in the author's modest opinion, conform to the new reality. The gravity of the suggestion, however, (the suggestion that we *may* question whether the residence of individuals as a basis for international taxation is something on which we can still rely and whether we are so focused on corporate income taxation that we are failing to see that the hitherto static nature of individuals is no longer a given) oversteps the boundaries of this article. Thus, it is safe to conclude this section by suggesting that the time is ripe for reconsidering our view of the residency of individuals and for giving thought to the idea of applying similar measures to those introduced to prevent companies from treaty abuse derived from their mobility in the global market to our increasingly mobile populations.

3.3. *The novelty of the concept of qualified residence of individuals for treaty purposes*

Although the idea of qualified residence of individuals for treaty purposes may seem novel, it could be argued that it has been enshrined in our double taxation treaties from their very inception. To be specific, while article 1 of the OECD/UN Models (2017) respectively stipulate that the Convention shall apply to persons who are residents of one or both of the

62. In medieval Europe, canon law set the minimum age for present consent to marry at 14 for men and 12 for women. C. Donahue, *The Cannon Law on the Formation of Marriage and Social Practice in the Later Middle Ages*, 8 *Journal of Family History* 2, p. 144 (1983). In late medieval Northern Europe, women first married on average between the ages of 18 and 23, while in the Mediterranean (Italy) it was closer to the lower part of that range. T. De Moor & J.L. van Zanden, *Girl power: the European marriage pattern and labor markets in the North Sea region in the late medieval and early modern period*, 63 *The Economic History Review* 1, p. 17 (2010). In India, the world's largest democracy, in the last decade of the 20th century, the median age of women at first marriage was below the age of 16 in 5 states (Andhra Pradesh, Bihar, Madhya Pradesh, Uttar Pradesh and Rajasthan), while for the whole nation it stood at 16.1/16.4. S.S. Padmadas, I. Huter & F. Willekens, *Compression of reproductive spans in Andhra Pradesh, India*, 30 *International Family Planning Perspectives* 1, p. 13 (2004).

63. E.g., in the United States, more than 40% of all children are born out of wedlock, while 32% of children live with one parent. Comparatively, 19% of children in France, the Netherlands and Spain live with only one parent, 25% in Sweden and 33% in the United Kingdom. In Italy, this percentage is quite a lot lower and similar to that of India, 6% and 5% respectively. International Family Studies, *World Family Map 2017 – Mapping Family Change and Child Well-Being Outcome*, p. 27 (2017), available at <https://worldfamilymap.ifstudies.org/2017/files/WFM-2017-FullReport.pdf>.

contracting states, the definition of the term “resident” is provided in paragraph 1 of article 4 of the Models:

For the purposes of this Convention, the term “resident of a Contracting State” means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof as well as a recognised pension fund of that State. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.⁶⁴

Vogel, with Ismer and Reimer concurring, instructs us that not all connecting factors provided by domestic law for asserting unlimited tax liability qualify as criteria of a similar nature to domicile, residence and place of management, i.e. the criteria explicitly mentioned in article 4(1) of the OECD/UN Models (2017). They take the position that criteria such as nationality, unlimited tax liability on request, deemed full liability to tax of diplomats or marriage to a resident do not fall under criteria of a similar nature, and that individuals that would be subject to unlimited tax liability on the basis of one of them could not be considered residents of the respective contracting state imposing that liability for the purposes of double taxation treaties that follow either the OECD or the UN Model. For a criterion to be of a similar nature to the ones expressly stated in article 4(1) of the OECD/UN Models, it has to, in addition to triggering unlimited tax liability, reflect a territorial link between the taxpayer and the jurisdiction concerned, while not requiring “a territorial connection of any kind between the taxpayer and the State would also blur the line between the source State and the residence State”.⁶⁵

The aforementioned authors take for granted that domicile or residence reflects a genuine territorial connection between a taxpayer and a particular jurisdiction. However, what would be the fundamental difference between being subjected to unlimited tax liability by virtue of marriage to a resident, despite never once setting foot in the country, except for the wedding ceremony, for example, and being considered a tax resident, despite leaving the country some years ago, simply because the childhood home from which you failed to deregister is located in its territory? How can we justify that citizenship will not warrant access to treaty benefits while an entry in the civic register does?⁶⁶

Thus, if we accept that the inherent idea behind article 4 of the OECD/UN Models is to allow access to double taxation treaties only to those individuals who have a territorial link with at least one of the treaty partners, and that domicile and residence of individuals seemed to be criteria of impeccable integrity at the time of the Models’ drafting, it would seem reasonable to further define the preconditions required for access to treaty benefits where it is evident that the integrity of the initial preconditions has been breached.

4. The New (Digital) Nomads

The sedentary way of life did not derive merely from the need to shelter one’s families and store one’s food. For most, the tools needed to perform their everyday work required the existence of a permanent settlement, as they were either too cumbersome to carry over

64. Art. 4(1) *OECD/UN Models*.

65. R. Isimer & K. Riemer, *Article 4*, in *Klaus Vogel on Double Taxation Conventions*, Fourth Edition, vol. 1, paras. 56 and 57 (E. Reimer & A. Rust eds., Kluwer Law International 2015).

66. See secs. 3. and 3.1.

large distances or were owned by someone else (e.g. feudal lords) who, in their own right, demanded attendance on site. Furthermore, work often involved cooperation with other humans, therefore language barriers were an important incentive for individuals to remain in localities in which they could communicate with ease.⁶⁷ However, the most recent technological revolution, combined with the ultimate triumph of the English language⁶⁸ as the first truly global lingua franca, allowed for the growing mobility of single individuals, who for the first time in many millennia, were not constrained by the need to procreate (in order to ensure as many hands in the field as possible) or by religious or cultural incentives to form a static family unit.

Indeed, current double taxation treaties do not focus on the growing number of global nomads, people who in their work, study or leisure are not confined to any single geographical location and whose mobility has been enabled by Internet technologies and mobile connection.⁶⁹

The global nomad is, as a rule, an expatriate (particularly if they originate from smaller countries – in larger countries the nomad may not have to cross the confines of the nation’s borders):

The concept of the expatriate may be that we will most readily associate with cosmopolitanism. Expatriates (or ex-expatriates) are people who have chosen to live abroad for some period.... Not all expatriates are living models of cosmopolitanism; colonialists were also expatriates, and mostly they abhorred “going native.” But these are people who can afford to experiment, who do not stand to lose a treasured but threatened, uprooted sense of self. We often think of them as people of independent (even if modest) means, for whom openness to new experiences is a vocation, or people who can take along their work more or less where it pleases them; writers and painters in Paris between the wars are perhaps the archetypes.⁷⁰

Unlike the foreign writers and painters in Paris between the First and Second World Wars, modern expatriates are able to change locations more readily for the simple reason that

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67. For the relevance of language in successfully mobilizing international labour, one does not need to look further than the Bible:
And the whole earth was of one language, and of one speech.
And it came to pass, as they journeyed from the east, that they found a plain in the land of Shinar; and they dwelt there.
And they said one to another, Go to, let us make brick, and burn them thoroughly. And they had brick for stone, and slime had they for mortar.
And they said, Go to, let us build us a city and a tower, whose top may reach unto heaven; and let us make us a name, lest we be scattered abroad upon the face of the whole earth.
And the Lord came down to see the city and the tower, which the children of men builded.
And the Lord said, Behold, the people is one, and they have all one language; and this they begin to do: and now nothing will be restrained from them, which they have imagined to do.
Go to, let us go down, and there confound their language, that they may not understand one another’s speech.
So the Lord scattered them abroad from thence upon the face of all the earth: and they left off to build the city.
Therefore is the name of it called Babel; because the Lord did there confound the language of all the earth: and from thence did the Lord scatter them abroad upon the face of all the earth.
Genesis 11:1-9 (King James Version).
68. Spanish in Latin America, French in parts of Africa as well as Arabic in the Middle East and North Africa play the same mobility enabling role in more limited environments. However, it is the English language which enables true global (not just continental or intracultural) mobility.
69. The term “digital nomad” has been credited to Makimoto and Manners. See T. Makimoto & D. Manners, *Digital nomad* (Wiley 1997).
70. U. Hannerz, *Transnational Connections: Culture, People, Places* p. 106 (Routledge 1996).

technology and modes of communication, as well as transportation, enable them to do so. According to Sutherland and Jarrahi:

digital nomads can be understood as an emerging sub-population of nomadic workers with a distinct motivation for world travel adventure and independent remote work. The motivation most often associated with the digital nomad's mobile lifestyle is travel adventurism and an escape from the office atmosphere.⁷¹

Furthermore, the job market is accommodating the digital nomad to a greater and greater extent. The idea that the term may be applied only to those involved in the IT sector is greatly undermined by data from the US Bureau of Labor Statistics, which reveal that in the world's largest economy in 2015, 24% of employed people did some or all of their work from home, a statistic that includes 38% of people in management, business and financial operations and 35% of people in professional and related occupations.⁷²

It would not be amiss to attempt to draw inspiration from the setting closest to home. To be specific, the work of tax lawyers has traditionally been bound to libraries and archives, which facilitate the research of statutes, jurisprudence and academic treatises. With the exception of those rare individuals with a perfect memory, the vast majority of tax lawyers could not, without considerable logistical difficulty, take their work with them, or were limited to a few places with the infrastructure necessary for their trade. Some no doubt recall the misery and cost of having to transport heavy loads of books and paperwork across international borders. However, those memories are rapidly fading, while the ranks of the profession are increasingly filled by those who have nothing to forget (the millennials⁷³). The dormancy of our work during holidays is, in most cases, no longer caused by objective (inability) but rather by subjective (refusal and unwillingness) reasons.

In today's digital world, not only are people losing the traditional personal ties to one specific place, but the concept of work is undergoing radical change. Does it still make sense to speak of an individual's fixed place of work when referring to persons whose primary tool is their laptop or, increasingly, their tablet or smart phone? From the perspective of income tax nexus regarding a particular place, the rules under which employment income is sourced at the place where employment is exercised were designed with a radically different vision of *how* employment is exercised, particularly employment in the service sector, which is most prone to mobility. Consequently, it is not only becoming more and more difficult to link a particular person to a specific jurisdiction for the purposes of taxation, but modern technology is also forcing a rethink of the way in which employment income is related to a particular geographical spot.

As the world becomes more technologically advanced and the human race more nomadic, it is becoming increasingly difficult to understand the rationale for equating the source of employment income only with the qualified situs of the employee during the performance

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71. W. Sutherland & M.H. Jarrahi, *The Gig Economy and the Information Infrastructure: The Case of the Digital Nomad Community*, 1 Proc. ACM Hum.-Comput. Interact. 1, p. 6 (2017).
 72. US Department of Labor, Bureau of Labor Statistics, *24 percent of employed people did some or all of their work at home in 2015* (8 July 2016), available at <https://www.bls.gov/opub/ted/2016/24-percent-of-employed-people-did-some-or-all-of-their-work-at-home-in-2015.htm>.
 73. According to the US Census Bureau, millennials are those individuals born between 1982 and 2000, see US Census Bureau, *Millennials Outnumber Baby Boomers and Are Far More Diverse*, *Census Bureau Reports* (25 June 2015), available at <https://www.census.gov/newsroom/press-releases/2015/cb15-113.html>.

of their employment. The OECD has recognized that the key concepts of international business taxation, namely the PE definition from article 5 of the OECD/UN Models, are losing consistency with the underlying principles on which they were based,⁷⁴ while academics are proposing alternatives to its requirement for the physical presence of enterprise.⁷⁵ More recently, on 21 March 2018, the European Commission announced a proposal on new rules for taxing digital business activities, among which was the Proposal for a Council Directive laying down the rules relating to the corporate taxation of a significant digital presence, which provides for the new digital PE.⁷⁶ The rules regarding employment income lag notably behind those of corporate taxation, owing in no small part to the fact that our experience as a race has not provided much incentive to seeking alternatives. The human race has thus far relied on the assumption that the concept of employment and the static nature of individuals would remain unchanged, and as a result would continue to shield income generated on this basis from the insecurities of the digital world. However, for the first time in many millennia, the human race is finding the nomadic lifestyle increasingly accessible, and tax treaties need to adjust to the new reality.

5. Questioning the Relevance of the Concept of the Digital Nomad for Taxation of Employment Income

Several arguments may be raised to dispute the relevance of the digital nomad reference for the purposes of drafting provisions relating to the delineation of taxation rights over employment income within tax treaties, two of which this article will address.

First, while it is true that the human race is becoming more mobile, it is safe to assume that it is still quite rare to find individuals who do not have a permanent home or, perhaps more poetically, no place where there is always a bed waiting for them. We will, in our professional lives, move from one jurisdiction to another but embed ourselves in each one for a while. Thus, while the concept of digital nomads is an entertaining novelty, is it not perhaps merely a passing habit of over-privileged millennials in affluent societies with no significant relevance to or impact on our tax systems? Tax legislations have always discounted those insignificant sections of the population against whom tax claims could not be enforced without unreasonable effort. Mobile expatriate populations will establish camp in one jurisdiction for at least several years, and this jurisdiction will serve, as it has always served, as their country of residence. Even if the family element is becoming increasingly disputable, are we not able to take comfort in the premise that the permanent home will always be there as a sound reference point for asserting unlimited tax liability?

Alas, there are no data on the actual number of digital nomads in the world today. Nonetheless, most of us know or have met at least one such individual, and the media attention paid to this demographic testifies to the growing relevance of the trend.⁷⁷ Perhaps

74. OECD/G20, *Action 1 Final Report*, *supra* n. 2, at para. 256.

75. See Hongler & Pistone, *supra* n. 31, at p. 25.

76. Proposal for a Council Directive laying down the rules relating to the corporate taxation of a significant digital presence, COM(2018) 147 final (21 Mar. 2018), EU Law IBFD.

77. Digital nomads is a topic that has been discussed in the media, such as by the BBC (J. Bloom, *Digital nomads: The new elite with no fixed abode*, BBC News (2 May 2018), available at <https://www.bbc.com/news/business-43927098>), The Economist (Special Report, *Nomads at last*, The Economist (10 Apr. 2008), available at <https://www.economist.com/special-report/2008/04/10/nomads-at-last>), Forbes (A. Gaskell, *Is Being a Digital Nomad the Key to a Happy Life*, Forbes (4 May 2018), available at <https://www.forbes.com/sites/adigaskell/2018/05/04/is-being-a-digital-nomad-the-key-to-a-happy-life/#4f687d46729c>), The

the most interesting information is that issuing from the tourism sector, which is primarily interested in individuals who are likely to travel. A 2018 survey of young travellers (aged 15 to 29) by the WYSE Travel Confederation, a global non-profit organization representing the youth, student and educational travel industry, estimated the global digital nomad population to be 1.8 million,⁷⁸ and noted their influence on this age demographic:

Even though digital nomads are still not numerically important (we estimate around 1.8 million globally on the basis of our survey), they have an influence on other young travellers through their blogging, travel advice and apparently desirable lifestyle.⁷⁹

MBO Partners' State of Independence Research Brief, 2018, states that there are 4.8 million independent workers in the United States alone who describe themselves as digital nomads.⁸⁰ The same source offers the surprising revelation that more than half of these 4.8 million are over 38 years of age.

Sutherland and Jarrahi, in their 2017 publication on the digital nomad community, used the "Digital Nomads Around the World" Facebook group as part of their empirical base, among other online forums. At the time, the group had 38,987 members.⁸¹ At the time of writing (30 October 2018), membership stood at 92,139.

While these figures may offer only vague indications⁸² in the absence of sound statistical data, conclusions may still be drawn. The digital nomad is undeniably an existing phenomenon that has started to acquire economic relevance. And though it is new, a number of factors confirm this article's position that it will only grow in relevance:

- All technological advancements, not only in IT but also in modes of travel and financing (e.g. the pre-eminence of plastic over cash, rendering main street currency dealers obsolete), lend themselves to enabling global nomadism.
- Legal and social developments support this trend: from platforms as employers, accommodation in the form of Airbnb and, more to the point, co-living environments, to greater flexibility in immigration and work permit legislation (e.g. European Union), particularly for those who possess sought-after skills.
- From a sociological perspective, the concept of global nomadism appears to be increasingly perceived as a positive alternative to the more settled lifestyle.

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Guardian (P. Beech, *Wandering stars: are Tallinn's digital nomads building the city of the future?*, The Guardian (15 May 2018), available at <https://www.theguardian.com/cities/2018/may/15/are-tallinn-digital-nomads-building-the-city-of-the-future>), The New York Times (T. Mohn, *The Digital Nomad Life: Combining Work and Travel*, The New York Times (3 Apr. 2017), available at <https://www.nytimes.com/2017/04/03/business/digital-nomads-work-tourism.html>), etc.

78. Defined as travellers who use digital technologies to work and/or support a location-independent lifestyle.
79. The WYSE Travel Confederation, *New Horizons IV – A global study of the youth and student traveler*, p. 13 (WYSE Travel Confederation 2018).
80. In relation to *The State Of Independence in America – 2018*, see MBO Partners, *Digital Nomadism: A Rising Trend* (2018), available at <https://www.mbopartners.com/uploads/files/state-of-independence-reports/StateofIndependence-ResearchBrief-DigitalNomads.pdf>.
81. Sutherland & Jarrahi, *supra* n. 71, at p. 8.
82. At the other side of the spectrum is a claim by Pieter Levels, founder of the Nomad List website, which tailors to the needs of the digital nomad community, that the number of digital nomads will reach 1 billion by 2035. Pieter Levels made this statement during his presentation at the 2015 DNX Global conference in Berlin (presentation available at <https://levels.io/future-of-digital-nomads/>).

Furthermore, as progress and increasing wealth enable more and more of us to adopt a neonomadic lifestyle, the effect of climate change on human migration trends may demand increasing consideration.⁸³ The bulk of taxation theory and, more particularly, most of our double taxation treaties were written in an era of unprecedented progress. But times are changing and we are now witness to a steady stream of migrants (or refugees) hoping to access countries that promise greater economic stability. At the same time, the voices warning of the decreasing capacity of the destination nations to permanently absorb all of the newcomers are growing louder. If the consequences of climate change lead to a growing need for regular seasonal employment in neighbouring jurisdictions, for instance, our double taxation treaties will need to respond accordingly, and provide more detailed solutions to challenges such as these deriving from a rapidly changing world.⁸⁴

The second argument relates to the question of whether this article misses the mark in choosing article 15 of the OECD/UN Model as its primary focus, as there are grounds to assume that the digital nomad will not, for the most part, be an employee, but rather an independent entrepreneur. This article will show that the concepts of employee and independent entrepreneur are becoming increasingly blurred in the digital economy, and that the very nature of employment is currently in flux. And while this article aims to address specific questions relating to the nature of employment and its relevance for taxation, one, perhaps heretical, preliminary question comes to mind: if we fail to find an evident differentiation point between employment and independent service provision, what is then our justification for treating the income generated from these activities differently?

83. For more on the impact of climate change on human migration, see The Government Office for Science, London, *Foresight: Migration and Global Environmental Change*, Final Project Report: Executive Summary (2011), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/287722/11-1115-migration-and-global-environmental-change-summary.pdf; Greenpeace Germany, *Climate Change, Migration and Displacement – The Underestimated Disaster* (Greenpeace 2017), available at <https://www.greenpeace.de/sites/www.greenpeace.de/files/20170524-greenpeace-studie-climate-change-migration-displacement-engl.pdf>; C. Raleigh, L. Jordan & I. Salhyan, *Assessing the Impact of Climate Change on Migration and Conflict* (Social Development Department, The World Bank Group 2008), available at http://siteresources.worldbank.org/EXTSOCIALDEVELOPMENT/Resources/SDCCWorkingPaper_MigrationandConflict.pdf; E. Piguet, *Climate change and forced migration*, New Issues in Refuge Research – Research Paper no. 153, UNHCR, Policy Development and Evaluation Service (UNHCR 2008), available at <http://www.unhcr.org/research/working/47a316182/climate-change-forced-migration-etienne-piguet.html>.

84. For an example of a specific bilateral treaty dealing with the taxation of cross-border workers, see M. Dahlberg & A.S. Önder, *Taxation of Cross-Border Employment Income and Tax Revenue Sharing in the Öresund Region*, 69 Bull. Intl. Taxn. 1 (2015), Journals IBFD. In 2017, the General Conference of the International Labour Organization, meeting at its 106th Session, passed the Resolution concerning fair and effective labour migration governance, within which we find the following challenges:

1. Labour migration is a feature of contemporary labour markets and of the future of work. National and international policy agendas increasingly prioritize labour migration. The 2030 Agenda for Sustainable Development and the Global Compact for Safe, Orderly and Regular Migration demonstrate the global significance of this issue, and offer an important opportunity for the International Labour Organization (ILO) to promote its Decent Work Agenda, including fundamental principles and rights at work.

2. Labour migration is growing more diverse and complex. Temporary labour migration is becoming more widespread. Many countries are now countries of origin, transit and destination at the same time. More women are joining the ranks of migrant workers and in some sectors, such as the care sector and domestic work, represent the majority of the migrant labour workforce. They can face discrimination, exploitation and abuse, including violence and harassment.

See General Conference of the International Labour Organization, *Resolution concerning fair and effective labour migration governance* (ILO 2017), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_561871.pdf.

6. The Theoretical Soundness of the Results Obtained under Article 15 of the OECD/UN Models (2017) in Regard to Digital Nomads

This article has thus far questioned the traditional reliance on the residence of the employee and their situs when exercising their employment for the purposes of delineating taxation rights over employment income for tax treaty purposes. At this point, the author would like to pause and attempt to construct a couple of scenarios that should be tested against the dominant international taxation theory that justifies either residence or source taxation. Even if one were to take the cynical but most probably accurate view that “in practical political terms, the modern theories have proved little more useful than the ancient theories, such as ‘economic allegiance’, which they have replaced”,⁸⁵ it is still safe to assume that they encompass the “ideology” of international taxation as it stands today. In essence, it should be possible to align the results of these scenarios with at least one of the prevailing theories justifying the taxation of income in the residence state and/or in the source state, namely the residence principle of taxation, the origin principle of taxation, the destination principle and the benefit principle. In designing the following scenarios, the author has attempted to follow the discourse of the typical digital nomad and found inspiration in one of the media reports on the topic, namely a 2 May 2018 BBC report entitled “Digital nomads: The new elite with no fixed abode”, which provides the quite logical reasoning behind the elementary temptations of the digital nomad lifestyle:

“People in the north of Europe earn quite a lot of money, and obviously it’s more convenient for them to live here [Portugal], because it is much cheaper. And also they can have a better quality of life because of the weather, the beach, etc,” [Cocola-Gant, University of Lisbon] says.

He argues that the digital nomads, earning North European wages and living in the cheap south, is forcing up house prices, turning family homes into holiday lets and driving out the locals who can no longer afford to live in the centre of Lisbon.

And their kind of lifestyle raises a different, but related challenge. How do you tax people if you don’t know where they are, or what they are doing?

A digital nomad might be working from Bali on a tourist visa, creating a website for an American company, to be used in France, but based on a server in Switzerland.⁸⁶

Scenario 1

An individual is a resident of country X. However, our digital nomad, unhappy with the climate of his native land, decides to travel the globe staying in various places for intervals that are insufficient to make him a tax resident of any of the countries he visits. He retains his tax residency of country X by maintaining a registered domicile address in its territory.⁸⁷ During his travels, our digital nomad works as an employee of company Z, resident in country Z, using his laptop as a portable work station, only requiring an infrastructure enabling him to charge the laptop battery and to provide a relatively decent wireless Internet connection.⁸⁸ All of the work performed by this individual is used for the purposes of company Z’s business in its residence state (Z). However, by virtue of modern technologies and communication tools, he does not need to actually travel to Z and meet his superiors in person, since he can talk to them digitally, face-to-face and in real time.

85. M.J. Graetz & M.M. O’Hear, *The “Original Intent” of US International Taxation*, 46 Duke L.J. 5, p. 1109 (1997).

86. See Bloom, *supra* n. 77.

87. A common feature of many tax systems worldwide.

88. E.g., virtual assistant, web designer, system administrator, social media manager, web or software developer, web analyst, search engine marketing specialist, search engine optimization specialist, performance marketing specialist, translator, web content writer, web editor, copywriter, customer support specialist and customer success specialist are just some of the potential career options for someone wanting to work remotely.

Scenario 2

Identical to scenario 1 with the difference that all of the work performed by our digital nomad for company Z is used for the purposes of company Z's clients in various countries around the world.

If we look at the rules of our double taxation treaties, we arrive at a somewhat illogical conclusion that contradicts the elementary theoretical framework of international taxation.

First of all, we notice that the origin-based source taxation principle⁸⁹ is not respected, as the states in which the work of our digital nomad took place were prevented from taxing him by virtue of his meeting all of the three cumulative criteria provided in article 15(2) of the OECD Model (2017). Our digital nomad did not stay in any jurisdiction for more than 183 days, while his salary was paid by an employer who is not a resident nor has a PE in any of the jurisdictions where his employment was exercised.

As defined by Kemmeren, the origin principle:

justifies allocation of tax jurisdiction on income to a state if the income has been created within the territory of that state, i.e. the cause of the income is within the territory of that state. The origin of income is where the intellectual element (among the assets) is to be found. This intellectual element is provided by the activities of individual human beings. Only individuals can create income and things in themselves cannot.⁹⁰

Neither was source taxation based on the destination principle applied. Namely, “the destination, on the other hand, (as opposed to origin) represents the demand side of income production and is where the goods and services produced are brought to market (business outputs), and where the existence of a source of income is conditional upon participation in economic or social exchanges”.⁹¹

In scenario 1, the digital nomad was employed by company Z, for the purposes of the market in country Z. However, under our double taxation treaties, country Z was prevented from taxing him due to the fact that we rely on the physical presence of the employee test to allocate taxation rights. He is not a resident of country Z, and since our digital nomad does not exercise his employment in country Z (where the exercise of employment is determined by answering the question, “Where is the employee located while he works?”), country Z is precluded from taxation by virtue of article 15(1) of the OECD/UN Models (2017).

In scenario 2, the digital nomad was employed by company Z for the purposes of markets around the world. These countries were prevented from taxing him due to the fact that, although employment may have been exercised in their territory, taxation prerogatives remained firmly in the hands of the residence state by virtue of this individual meeting all the three cumulative conditions provided in article 15(2) of the OECD/UN Models (2017).

It should also be noted that the destination principle in its purest form would not see its application within article 15 of the OECD/UN Models (2017) due to the dependent nature of the employment relationship, and it is more appropriate for taxing the employer, rather than the employee who lacks the entrepreneurial element linking him to a particular mar-

89. E.C.C.M. Kemmeren, *Source of Income in Globalizing Economies: Overview of the Issues and the Plea for an Origin-Based Approach*, 60 Bull. Intl. Taxn. 11, sec. 2.3.1. (2015), Journals IBFD.

90. E.C.C.M. Kemmeren, *Legal and Economic Principles Support an Origin and Import Neutrality-Based over a Residence and Export Neutrality-Based Tax Treaty Policy*, in *Tax Treaties: Building Bridges between Law and Economics* sec. 5. (M. Lang et al. eds., IBFD 2010).

91. M. de Wilde, *Tax Jurisdiction in a Digitalizing Economy; Why ‘Online Profits’ Are So Hard to Pin Down*, 43 Intertax 12, p. 798 (2015).

ket – the employee’s *market* is the employer. However, not even this perspective is gratified, as the employers’ states are not allowed to collect tax in the absence of the physical presence of the employee in their territories during the exercise of his employment.

The benefit principle under which taxes should be levied in accordance with the use made or benefits received from government goods and services is not adhered to. In other words, the digital nomad is not being taxed in any of the countries on whose infrastructure he relies to generate his income. Simply stated, the digital nomad contributed nothing in terms of income tax on his employment income to any of the utilities, roads or any other public service he relied upon in his everyday life (e.g. police, fire department, emergency services, etc.).

The result from the application of the provisions of article 15 of the OECD/UN Models (2017) is that state X, the state of our digital nomad’s residence, will be the one to have exclusive taxation rights over his employment income.

What arguments may be invoked to defend the resulting sole taxation in the residence state?

Avi-Yonah provides the following:

In the case of individuals, residence-based taxation makes sense. First, residence is relatively easy to define in the case of individuals. Second, because most individuals are part of only one society, distributive concerns can be addressed most effectively in the country of residence. Third, residence overlaps with political allegiance, and in democratic countries, residence taxation is a proxy for taxation with representation.⁹²

However, in the case of the digital nomad, only the ease of defining residence stands up to criticism, although it is the ease of changing residence that is (one of) the concept’s Achilles heels. In other words, if country X is not accommodating, the digital nomad may try to find some other jurisdiction as his residence state. If that chosen residence state, in addition to fine weather and lovely beaches, offers remittance-based taxation (e.g. Thailand),⁹³ our digital nomad may attain the holy grail (or commit the sacrilege) of double or triple non-taxation. One might hear a certain dose of sarcasm in noting that the most technologically advanced sections of our societies may have a vested interest in maintaining archaic concepts of tax residence based on notions of domicile or registration with the civic registers, for instance, particularly if they operate in conjunction with an unconditional exemption for foreign-sourced income as the adopted method for avoiding double taxation of employment income under domestic law.

The digital nomad is not part of any one society, apart from his own social subgroup, and distributive concerns are neglected since he enjoys the benefits of infrastructure to which he does not contribute by way of income taxes.

From the political perspective, Faist notes the misalignment of the basic pillars of our democratic system and the increasing tendency of the global workforce to be on the constant move:

It looks as if one positively loaded pole, sedentarism, is increasingly being replaced by its opposite, nomadism. This shift towards a positive evaluation of movement is deeply problematic because it usually does not reflect underlying trends that aim to build a flexible, docile and

92. Avi-Yonah, *supra* n. 55, at p. 11.

93. T. Morstadt, *Thailand - Individual Taxation* sec. 7., Country Analyses IBFD (accessed 28 Oct. 2018).

politically abstinent global workforce, processes sometimes discussed under the label “neoliberalism”. Also, it does not engage in questions of how locally based political equality and liberty, that is democracy, is compatible with high degrees of spatial mobility.⁹⁴

The one palatable contribution the author can offer is to suggest that the debate should at least begin on the theoretical basis of a rule that is losing touch with reality. The digital nomads are slowly but surely taking their place in the expatriate employee community, which was previously completely driven by transfers between the various branches and subsidiaries of multinational enterprises around the globe. Technology allows us to exchange the office environment with any environment capable of supporting our mobile work station, while the sedentary family-driven lifestyle is being augmented if not yet replaced by neomadism, as the age at which some sort of geographical permanence becomes a necessity is being extended ever further (recall the median age of women at the birth of their first child).

In our mobile world, an alternative method may be found in the already advocated relativization of our unconditional reliance on the residence of individuals, where some form of qualified residence of individuals should be introduced in order to enjoy treaty benefits.

Another, which would allow the residence state to retain its principal position, would be to do away with the exemption provided under article 15(2) of the OECD Model (2017), and perhaps retain just the presence threshold, but lowered from 183 days to a more appropriate level, as it is no longer viable in the modern setting. Administrative difficulties could be avoided through the introduction of a redistribution mechanism wherein the residence state would transfer an appropriate portion of the tax revenues collected to the source state.⁹⁵

7. Is There Life Outside the Employment Relationship?

7.1. A common understanding of employment?

Article 15 of the OECD/UN Models (2017) is devoted to the taxation of remuneration (salaries and wages) derived in respect of employment. In other words, the application of the provisions of article 15 of the OECD/UN Models (2017) can only take place in the event of an employment relationship (employment). Thus, the question of what constitutes employment must be asked. Furthermore, the exception to the general rule that the source state has the right to tax the remuneration derived from the exercise of employment in its territory depends, in part, on us being able to precisely identify the employed individual’s employer.

The OECD/UN Models (2017) do not provide a definition of either of the terms and for interpretation purposes we must refer to article 3(2) of the Models:

As regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.

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94. T. Faist, *The mobility turn: a new paradigm for the social sciences*, 36 *Ethnic and Racial Studies* 11, p. 1644 (2013). See, with the reliance on an individual’s political activities for the purpose of determining his or her centre of vital interests in applying the tax treaties, the tie-breaker provision found in para. 15 *OECD Model: Commentary on Article 4* (2017).

95. Such a solution, without the lowering of the 183-day temporal threshold, may be found in art. 9(1) *ILADT Model* (2012).

From a traditional tax treaty application perspective, what can immediately be noted is the issue of the potential disagreement between the contracting states if we are forced to rely on the provision corresponding to article 3(2) of the OECD/UN Models (2017). It is not impossible to imagine a situation where one sees a particular relationship as employment while the other deems it an independent provision of services, for example.⁹⁶

The academic literature offers opinions to the effect that the Commentary on Article 15 of the OECD Model from 2010 onwards clearly sets out a rule under which it is the state in which the activities are performed that should have primacy in determining whether or not the relationship in question is in fact one of employment.⁹⁷ Such a position is in line with the provision of paragraph 32.3 of the Commentary on Articles 23 A and 23 B of the OECD Model (2017), which states that:

Where, due to differences in the domestic law between the State of source and the State of residence, the former applies, with respect to a particular item of income or capital, provisions of the Convention that are different from those that the State of residence would have applied to the same item of income or capital, the income is still being taxed in accordance with the provisions of the Convention, as interpreted and applied by the State of source. In such a case, therefore, the two Articles require that relief from double taxation be granted by the State of residence notwithstanding the conflict of qualification resulting from these differences in domestic law.

However, the Commentary on Article 15 of the OECD Model, particularly in versions prior to 2010, suggests that the drafters of the OECD Model took for granted some form of a common understanding of both of the applied terms, i.e. employment and employer. Such an impression is supported by the fact that paragraph 8 of the Commentary on Article 15 of the OECD Model (1992) offers the following statement:

In this respect it should be noted that the term “employer” is not defined in the Convention but it is understood that the employer is the person having rights on the work produced and bearing the relative responsibility and risk.

Vogel elaborates:

Nor do the MCs define the term “dependent personal services.” Paragraph 3 of the OECD MC Comm (supra m.no. 4) names only some activities as examples (sales representatives, construction workers, engineers) which typically fall under the term. But – as in regards to various other classes of income (business, independent personal services) – it can be assumed that the MCs are based on a common understanding of the type of activities to be covered by the term “dependent personal services.” The term is accordingly to be derived on the one hand by distinguishing it from other types of income (particularly from business profits and income from independent activities) and on the other hand by referring to a common international understanding. Dependent services may thus be presumed if a person – the employee – makes his capacity for work available to another – the employer – and, in performing such activities, the employee is obligated to follow the directions and instructions of the employer (Coulombe, G., CDFI LXVIIb 63, 64ff. (1982)). It would, therefore, not be permissible for a contracting State to exclude arbitrarily from the scope of the “dependent personal services” an activity falling under this understanding (e.g., that of an industrial worker). However, where the classification of the

96. Common law countries recognize the difference between statutory employees and common law employees and this delineation has tax implications as well. See US: *Donald G. Cave A Professional Law Corp. v. Commissioner*, U.S. Tax Court, CCH Dec. 58,558(M), T.C. Memo. 2011-48, 101 T.C.M. 1224 (28 Feb. 2011). On the other hand, civil law countries do not make such a distinction between various categories of employees.

97. L. De Broe, *Article 15*, in *Klaus Vogel on Double Taxation Conventions*, vol. 1, para. 93 (4th ed., E. Reimer & A. Rust eds., Kluwer Law International 2015).

activities may come against doubts, it would be proper to resort to domestic law concerned for classification.⁹⁸

[...]

A definition of the term “employer” is not to be found in the MCs. Reference to domestic law definitions, however, as is the case with the terms “dependent personal services” and “income from dependent personal services” is necessary only in the case of uncertainty (see *supra* m. nos. 14a; 16). The meaning of the term may be determined according to the general criteria arising from the context of the MC provision as well as from the inverse of the meaning of the term employee. Accordingly, an employer is someone to whom an employee is committed to supply his capacity to work and under whose direction the latter engages in his activities and whose instructions he is bound to obey. This definition is also in accordance with the international understanding of the term “employer.”⁹⁹

Common sense drives agreement with a presumption that the drafters of the OECD Model had assumed the existence of a common international understanding of the term employment (and thus employer). It is safe to go even further and state that there is no other term in the OECD Model to which they showed such a strong indication as to the existence of a common understanding. Dividends,¹⁰⁰ interest¹⁰¹ and royalties,¹⁰² for instance, despite being terms that are almost exclusively given a common understanding, are all more closely defined within the norms stipulating the delineating of taxation rights between the contracting states. Furthermore, in article 19 of the OECD Model (2017), one commonly understood term, “pensions”, is more closely defined by reference to past employment, a term itself not defined anywhere in the Model.

Unfortunately, finding a common understanding of either the term “employment” or the terms “employee” and “employer” is becoming an increasingly daunting task, and referring to the Commentary may provide only limited guidance.

7.2. An employment relationship

Prior to analysing the provisions of the Commentary, which may shed more light on the interpretation of the terms “employee”, “employer” and “employment”, we must note that these provisions are to be found under the guise of a deliberation on the specific issue of when a worker becomes an employee of the person for whom they are sent to work while

98. K. Vogel, *Klaus Vogel on Double Taxation Conventions* p. 891 (3rd ed., Kluwer Law International 1997).

99. *Id.*, at p. 899.

100. Art. 10(3) *OECD Model* (2017):

The term “dividends” as used in this Article means income from shares, “jouissance” shares or “jouissance” rights, mining shares, founders’ shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident.

101. *Id.*, at art. 11(3):

The term “interest” as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor’s profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest for the purpose of this Article.

102. *Id.*, at art. 12(2):

The term “royalties” as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.

being formally employed by another person. In other words, they are not primarily directed to answering the question of whether the individual is an employee at all, but whether they can be deemed an employee of the person to whom they are sent despite being formally employed by the other person. Thus, we could conclude that it is not only in the OECD Model (2017) itself, but also within the Commentary that we find no guidance as to a common international understanding of terms crucial for interpreting article 15 of the Model. However, the analysis and conclusion found in the Commentary should not so easily be disregarded. To illustrate our caution and further reliance on the provisions of the Commentary, let us compare two situations.

Scenario 1

An individual is in an ambiguous contractual relationship with a non-resident enterprise and is sent to work in a particular jurisdiction for that enterprise. No services are provided to enterprises resident in the host state. In order to determine if article 15 of the OECD Model (2017) is to be applied to this individual's income, we must answer the question of whether his contractual relationship is that of employment.

Scenario 2

An individual is in an employment relationship with a non-resident enterprise and is sent to work in a particular jurisdiction where they are to provide services to an enterprise resident in that jurisdiction for a period of under 183 days. In order to determine if the exemption from the general rule that the state where employment is exercised is entitled to tax income derived in respect of such employment, we must determine if the individual's remuneration is paid by, or on behalf of, an employer who is a resident of the state where employment is exercised. In other words, we must determine the nature of the relationship between the individual and the enterprise resident in the state where work is performed and whether that enterprise can be deemed this person's employer.

In the first scenario, we are determining whether the position of the individual regarding the enterprise they are providing services to is that of an independent contractor or that of an employee. In the second, we are determining the true nature of the relationship between an individual who is already formally employed by another person and the enterprise to which they are providing services. As, in the author's opinion, the legal analysis to be employed in resolving these two scenarios must be based on the same premises, we may rely on the conclusions of the one in the Commentary, which expressly relate to resolving our second scenario, for the purpose of deducting more general interpretation principles.

After a general introductory statement "that it may be difficult, in certain cases, to determine whether the services rendered in a State by an individual resident of another State, and provided to an enterprise of the first State (or that has a permanent establishment in that State), constitute employment services, to which Article 15 applies, or services rendered by a separate enterprise, to which Article 7 applies or, more generally, whether the exception applies", the Commentary notes that:

In some States, a formal contractual relationship would not be questioned for tax purposes unless there were some evidence of manipulation and these States, as a matter of domestic law, would consider that employment services are only rendered where there is a formal employment relationship.¹⁰³

In other words, the Commentary is stating that some states equate the term "employment" with a formal employment relationship.

103. Para. 8.2 *OECD Model: Commentary on Article 15* (2017).

As an alternative approach to understanding the notion of “employment”, the Commentary offers a more substance-oriented one:

In many States, however, various legislative or jurisprudential rules and criteria (e.g. substance over form rules) have been developed for the purpose of distinguishing cases where services rendered by an individual to an enterprise should be considered to be rendered in an employment relationship (contract of service) from cases where such services should be considered to be rendered under a contract for the provision of services between two separate enterprises (contract for services). That distinction keeps its importance when applying the provisions of Article 15, in particular those of subparagraphs 2 b) and c). Subject to the limit described in paragraph 8.11 and unless the context of a particular convention requires otherwise, it is a matter of domestic law of the State of source to determine whether services rendered by an individual in that State are provided in an employment relationship and that determination will govern how that State applies the Convention.¹⁰⁴

It is rather difficult to comprehend the ultimate difference between the two approaches provided by the Commentary, for in the second, “employment” is also identified as the employment relationship, although a relationship determined by reference to substance rather than form. However, the reference to questioning for tax purposes of formal contractual relationships in the case of the existence of some evidence of manipulation tends to blur the *criterium divisionis* between the two offered approaches, at least from a tax perspective.

The Commentary can easily be aligned with the positions found in prevalent employment law discussions:

26. The determination of the existence of an employment relationship should be guided by the facts, and not by the name or form given to it by the parties. That is why the existence of an employment relationship depends on certain objective conditions being met and not on how either or both of the parties describe the relationship. This is known in law as the principle of the primacy of fact, which is explicitly enshrined in some national legal systems. This principle is also frequently applied by judges in the absence of an express rule.

[...]

28. In some legal systems, certain indicators are relied on to identify whether or not the relevant factors are present to determine the existence of an employment relationship. These indicators include the extent of integration in an organization, who controls the conditions of work, the provision of tools, materials or machinery, the provision of training and whether the remuneration is paid periodically and constitutes a significant proportion of the income of the worker. In common law countries, judges base their rulings on certain tests developed by case law, for example the tests of control, integration in the enterprise, economic reality, who bears the financial risk, and mutuality of obligation. In all systems, the judge must normally decide on the basis of the facts, irrespective of how the parties construe or describe a given contractual relationship.¹⁰⁵

[...]

71. Many national labour laws contain provisions on the employment relationship, particularly with regard to scope. Despite certain similarities, however, not all national labour laws provide exhaustive or equal coverage of the subject. Some provisions deal with the regulation of the employment contract as a specific contract, its definition, the parties and their respective obligations. Other provisions are intended to facilitate recognition of the existence of an employment

104. Id., at para. 8.4.

105. International Labour Conference, 95th Session, Report V(1), *The employment relationship*, pp. 7-8. (ILO 2006).

relationship and prescribe administrative and judicial mechanisms for monitoring compliance and enforcing these laws.¹⁰⁶

[...]

74. In many countries, the legislation contains a substantive definition of the employment contract, worded in such a way as to establish what factors constitute such a contract and hence what distinguishes it from other similar contracts. In other countries, however, the legislation is less detailed and the task of determining the existence of an employment contract is largely left to case law.¹⁰⁷

In essence, in order to apply article 15 of the OECD/UN Models, it is necessary to ascertain if an individual is in an employment relationship. Some countries will be more formalistic and will hesitate to infer its existence in the absence of a formal employment contract, while others will be more flexible and will look at the facts and circumstances of an individual case rather than to its formal cloak. In the case of the former, the Commentary provides solutions to defend them from abuse.¹⁰⁸

Scrutiny of paragraphs 8.5 and 8.6 of the Commentary on Article 15 of the OECD Model (2017) yields an ambiguous provision. Paragraph 8.5 of the Commentary on Article 15 of the OECD Model states that relevant domestic tax legislation may treat services provided under a formal contract for services as employment services. Employment law literature suggests that there are forms of employment outside the employment relationship,¹⁰⁹ while domestic legislation provides examples where income from certain forms of employment that statutorily do not constitute an employment relationship are, for tax purposes, treated as income from employment.

Thus, could this article's initial conclusion that the term "employment" should be interpreted as encompassing nothing but employment relationships be false, and should the term be understood in a broader context? Paragraph 8.6 of the Commentary on Article 15 of the OECD Model reverts back to the narrower scope of the term in its employment relationship sense:

8.6 In such cases, the relevant domestic law may ignore the way in which the services are characterised in the formal contracts. It may prefer to focus primarily on the nature of the services rendered by the individual and their integration into the business carried on by the enterprise that acquires the services to conclude that there is an employment relationship between the individual and that enterprise.

It stands to reason that tax legislation cannot independently conclude that an employment relationship exists where employment law expressly states the opposite, while paragraph 8.6 – which begins with the words "In such cases" – cannot be understood otherwise but as

106. Id., at p. 19.

107. Id., at p. 20.

108. Para. 8.3 *OECD Model: Commentary on Article 15* (2017).

109. Various criteria are used to distinguish between the employment relationship and other relationships. According to certain criteria, an employment relationship exists where a person works or provides services in a situation of subordination to or dependency on the employer; or works for someone else; or is integrated in an organization; or does not assume the risks specific to an employer. In some cases, the law goes one step further, and classifies as employees certain workers whose situation could be ambiguous, or provides for a presumption in their case that there is an employment relationship. *Conversely, legislation may specify that certain forms of employment are not employment relationships.* [emphasis added]

International Labour Conference, 91st Session, Report, *The scope of the employment relationship*, pp. 22-23 (ILO 2003).

a continuation of the analysis provided under the preceding paragraph of the Commentary on Article 15 of the OECD Model. Therefore, one must conclude that these two provisions just confirm that it would be possible to assert for tax purposes that a certain relationship should be characterized as an employment relationship despite its different formal appearance, regardless of the question of whether an employment tribunal confirmed such an interpretation. However, in circumstances where primary labour legislation denies beyond any doubt the ability for certain contractual forms to create an employment relationship, tax legislation, for tax treaty purposes, cannot do so independently, as this would imply the existence not of a substance-over-form approach, but of a separate international tax labour law. In such cases, it is only possible to recognize the effects of statutory provisions that will award certain contractual relationships identical tax treatment, in contrast to the one applied to employment relationships, without ever deeming them representative of the latter.

The author would like to pause here and attempt to illustrate in practical terms the outlined conclusions. Article 197 of Serbia's Labour Law,¹¹⁰ for example, stipulates that a contract on temporary and occasional tasks, concluded for the performance of tasks that do not require more than 120 working days in a calendar year, does not constitute an employment relationship, while article 13(2) of the Personal Income Tax Law¹¹¹ treats the income derived on the basis of such a contract as employment income (or to be more precise, a salary).

The delineation of taxation rights over income generated on the basis of a contract on temporary and occasional tasks cannot be performed by virtue of article 15 of the OECD Model (2017), as despite being taxed as employment income, the income does not arise from a relationship considered employment under domestic law.

The Commentary ends the discussion on the concept of employment without any resolution, for the statement that the concept of employment is to be determined in accordance with the domestic law of the state that applies the convention¹¹² is followed by a rather broad and imprecise obligation of that state to abide with the context of a particular convention and to base its determination on objective criteria:

For instance, a State could not argue that services are deemed, under its domestic law, to constitute employment services where, under the relevant facts and circumstances, it clearly appears that these services are rendered under a contract for the provision of services concluded between two separate enterprises. The relief provided under paragraph 2 of Article 15 would be rendered meaningless if States were allowed to deem services to constitute employment services in cases where there is clearly no employment relationship or to deny the quality of employer to an enterprise carried on by a non-resident where it is clear that that enterprise provides services, through its own personnel, to an enterprise carried on by a resident. Conversely, where services rendered by an individual may properly be regarded by a State as rendered in an employment relationship rather than as under a contract for services concluded between two enterprises, that State should logically also consider that the individual is not carrying on the business of the enterprise that constitutes that individual's formal employer; this could be relevant, for example, for purposes

110. RS: *Zakon o radu* [Labour Law] 2005 (amended 2017), *Official Gazette of the Republic of Serbia*, nos. 24/05, 61/05, 54/09, 32/13, 75/14, 13/17, 113/17.

111. RS: *Zakon o porezu na dohodak gradjana* [Personal Income Tax Law] 2001 (amended 2017), *Official Gazette of the Republic of Serbia*, nos. 24/01, 80/02, 80/02, 135/04, 62/06, 65/06, 31/09, 44/09, 18/10, 50/11, 91/11, 93/12, 114/12, 47/13, 48/13, 108/13, 57/14, 68/14, 112/15, 113/17.

112. Para. 8.7 *OECD Model: Commentary on Article 15* (2017).

of determining whether that enterprise has a permanent establishment at the place where the individual performs his activities.¹¹³

Thus, were the author to take the previous Serbian example, the conclusion as to the inapplicability of article 15 of the OECD Model (2017) would stand even if Serbia were to amend its domestic tax legislation to state that it is not only the income from a contract regarding temporary and occasional tasks that will be treated identically to employment income, but that the whole relationship will be treated as one of employment for tax purposes. Such a result is conditioned on the existence of a common understanding of an employment relationship embedded in the OECD Model, further testifying to this article's initial preposition.

Paragraphs 8.8, 8.9 and 8.10 of the Commentary on Article 15 of the OECD Model deal with the possibility that a state that cannot question the formal contractual relationship may still deny the application of the provided exception from the general rule in abusive cases. However, they do little to alleviate this article's interpretative dilemmas as, in order to fight abuse, one must first define the notion (with its object and purpose) that is being abused – the one of employment in the case of article 15 of the OECD Model (2017).

In 2010, paragraphs 13 and 14 were introduced into the Commentary on Article 15 of the OECD Model, which should enable the determination of an employment relationship. According to paragraph 13, an employment relationship is one where the services of an individual constitute an integral part of the business of the enterprise to which the services are provided and where this enterprise also bears the responsibility or the risk for the results provided by the individual's work. It is rather difficult not to equate the content of paragraph 13 of the Commentary on Article 15 of the OECD Model with a definitive statement of the common international understanding of the concept of employment. However, one could easily argue that such a definition is not of much practical use as it would not facilitate the resolution of a number of scenarios. Unfortunately, paragraph 14 of the Commentary on Article 15 of the OECD Model provides additional criteria for determining the existence of an employment relationship, but solely in the context of a situation in which the identity of the employer is unclear:¹¹⁴

- who has the authority to instruct the individual regarding the manner in which the work has to be performed;
- who controls and has responsibility for the place at which work is performed;
- the remuneration of the individual is directly charged by the formal employer to the enterprise to which the services are provided;
- who puts the tools and materials necessary for the work at the individual's disposal;
- who determines the number and qualifications of the individuals performing the work;
- who has the right to select the individual who will perform the work and to terminate the contractual arrangement entered into with that individual for that purpose;
- who has the right to impose disciplinary sanctions related to the work of that individual;
- who determines the holidays and work schedule of that individual.

113. Id., at para. 8.11.

114. In other words, in circumstances where there is no dispute that the employment relationship exists in the first place. All of the examples of the operation of para. 8.14 that are given in paras. 8.16 to 8.28 *OECD Model: Commentary on Article 15 (2017)* assume the existence of an employment relationship and deal with the issue of the entity to whom it should be attributed.

Vogel's words resonate loudly as the objective criteria to which the Commentary refers can only be understood to mean some sort of common understanding of the term "employment", an understanding broad enough to encompass borderline cases, but also sufficiently flexible to exclude them, while preventing contracting states from making the provisions of article 15 of the OECD Model meaningless by introducing into their domestic legislation notions that cannot represent employment according to common international understanding. The conducted analysis of this article leads to the conclusion that the authors of the Commentary on Article 15 of the OECD Model (2017) understood the term "employment" as referring to an employment relationship, a principle that is not tax origin-based and for which no common definition can be given, but for which we can only outline the essential common features without which an employment relationship cannot exist: dependency, subordination and remuneration.¹¹⁵

8. Back to the Future and the Dependent Personal Services Approach (Provided What Is to Be Taxed Is Understood)

In addition to the mundane conclusion (already made by earlier commentators) that if a common understanding of the term "employment" truly exists, an autonomous definition of the term should be provided in the OECD Model,¹¹⁶ or at least in the Commentary, and a more valid one can be made with respect to the potential dangers that reliance on fluid labour law concepts, such as the employment relationship, can have for the future of tax treaties. Developments in labour law will strive to protect the rights of employees in an economic environment in which it is no longer certain who the employee is, who the employer is and what constitutes an employment relationship.¹¹⁷ (International) tax law does not have an identical purpose to labour (employment) law, and this premise should be borne in mind when introducing "foreign" concepts into the ambit of tax legislation.

The need to step away from the concept of "employment" and introduce a broader one is fuelled by the growing relevance of the new "collaborative economy", which the European Commission defines as:

business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals. The collaborative economy involves three categories of actors: (i) service providers who share assets, resources, time and/or skills – these can be private individuals offering services on an occasional basis ("peers") or service providers acting in their professional capacity ("professional services providers"); (ii) users of these; and (iii) intermediaries that connect – via an online platform – providers with users and that facilitate transactions between them ("collaborative

115. International Labour Conference, *supra* n. 105, at pp. 19-21.

116. E. Burgstaller, "Employer" Issues in Article 15(2) of the OECD Model Convention – Proposals to Amend the OECD Commentary, 33 Intertax 3, pp. 132-133 (2005).

117. C.W. Summers states that for the last 150 years, labour legislation throughout the world has been "rooted in a basic premise and expressed a common purpose. The premise is that individual workers lack the bargaining power in the labor market necessary to protect their own interests and to obtain socially acceptable terms of employment. When there is such economic inequality, the function of the law is to protect the weaker party" [emphasis added]. C.W. Summers, *Labor Law as the Century Turns: The Changing of the Guard*, 67 Neb. L. Rev. 1, p. 7 (1988). K. Andrias notes that one of the most fundamental commitments of labour law is to help "achieve greater economic and political equality in society". K. Andrias, *The New Labor Law*, 126 Yale L.J. 1, p. 9 (2016).

platforms”). Collaborative economy transactions generally do not involve a change of ownership and can be carried out for profit or not-for-profit.¹¹⁸

The Uber case before the UK employment tribunal further contributes to this article’s plea,¹¹⁹ because it not only confirms future obstacles in understanding labour law terminology, but also shows that the new digital economy is not merely complicating the employee status, but is perhaps leading us away from the employee vs. independent contractor dichotomy altogether. The UK Employment Tribunal, in determining whether Uber drivers may be considered workers,¹²⁰ introduced the following analysis:

92. [...] The drivers provide the skilled labour through which the organisation delivers its services and earns its profits. We base our assessment ... in particular on the following considerations.

- (1) The contradiction in the Rider Terms between the fact that ULL purports to be the drivers’ agent and its assertion of “sole and absolute discretion” to accept or decline bookings.
- (2) The fact that Uber interviews and recruits drivers.
- (3) The fact that Uber controls the key information (in particular the passenger’s surname, contact details and intended destination) and excludes the driver from it.
- (4) The fact that Uber requires drivers to accept trips and/or not to cancel trips, and enforces the requirement by logging off drivers who breach those requirements.
- (5) The fact that Uber sets the (default) route and the driver departs from it at his peril.
- (6) The fact that UBV fixes the fare and the driver cannot agree a higher sum with the passenger. (The supposed freedom to agree a lower fare is obviously nugatory.)
- (7) The fact that Uber imposes numerous conditions on drivers (such as the limited choice of acceptable vehicles), instructs drivers as to how to do their work and, in numerous ways, controls them in the performance of their duties.
- (8) The fact that Uber subjects drivers through the rating system to what amounts to a performance management/disciplinary procedure.
- (9) The fact that Uber determines issues about rebates, sometimes without even involving the driver whose remuneration is liable to be affected.
- (10) The guaranteed earnings scheme (albeit now discontinued).
- (11) The fact that Uber accepts the risk of loss which, if the drivers were genuinely in business on their own account, would fall upon them.
- (12) The fact that Uber handles complaints by passengers, including complaints about the driver.

118. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a European Agenda for the Collaborative Economy, SWE(2016) 184 Final, 2 June 2016, COM(2016) 356 final, p. 3.

119. UK: EAT, 10 Nov. 2017, *Uber B.V., Uber London LTD, Uber, Britannia LTD v. Asslam, Farrar, Dawson and others*, Appeal No. UKEAT/0056/17/DA.

120. Under section 230(3) of the UK Employment Rights Act 1996:
3) “worker” ... means an individual who has entered into or works under (or, where the employment has ceased, worked under) –
(a) a contract of employment, or
(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

(13) The fact that Uber reserves the power to amend the drivers' terms unilaterally.¹²¹

Comparing the criterion on which the UK Employment Tribunal relied with the definition of an employment relationship and the tests used in ascertaining its existence from paragraphs 13 and 14 of the Commentary on Article 15 of the OECD Model (2017) may lead one to ask whether Uber drivers are the company's employees for the purpose of double taxation treaties that impose a choice between just two options, that of an employee or that of an independent contractor, with no intermediate solution.

Harris and Kureger illustrate some of this article's dilemmas in their groundbreaking 2015 work, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"*:

The heart of the challenge for independent workers is that they do not resemble independent contractors or employees with respect to their most fundamental characteristics. Independent workers typically have little individual bargaining power and, as a result, do not have the ability to negotiate contracts with either intermediaries or their ultimate customers that could secure for them the protections and benefits that are available to employees. They are not true independent businesspeople in that they do not have freedom to negotiate their compensation or terms of service. But their relationships with intermediaries are not so dependent, deep, extensive, or long lasting that we should ask these intermediaries to assume responsibility for all aspects of independent workers' economic security. They are not true employees. Thus, the existing employee-independent contractor dichotomy does not offer a satisfying or reliable path in these new and emerging circumstances.

Forcing these new forms of work into a traditional employment relationship could be an existential threat to the emergence of online-intermediated work, with adverse consequences for workers, consumers, businesses, and the economy. At the same time, relying on the existing employee-independent contractor dichotomy to classify workers whose circumstances do not easily fit either definition risks depriving those workers of any benefits or protections of the social compact, and risks the erosion of the social compact for employees. If the dual goals of labor and employment law are increased efficiency and protection of workers from the consequences of unequal bargaining power, then the status quo serves neither goal in the case of independent workers.¹²²

As the calls to introduce a third category of workers to fit between employees and independent contractors become louder,¹²³ numerous questions arise. Some authors propose the creation of a new *sui generis* category of workers, while others are advocating the introduction of new categories of employment.¹²⁴ Should these proposals see the light of day – and they are already being introduced in the domestic legislation of some countries¹²⁵ – we will be forced to deal with aligning these new concepts of work with the provisions of double taxation treaties.

121. *Uber B.V.* (2016), at para. 92.

122. Harris & Krueger, *supra* n. 6, at pp. 8-9.

123. A. Stemler, *Betwixt and Between: Regulating the Shared Economy*, 43 *Fordham Urb. L.J.* 1, pp. 61-62 (2016); M.A. Cherry & A. Aloisi, "Dependent Contractors" in the Gig Economy: A Comparative Approach, 66 *American University Law Review* 3, p. 637 (2017); A. Todoli Signes, *The 'gig economy': employee, self-employed or the need for a special employment regulation?*, 23 *Transfer: European Review of Labor and Research* 2, p. 205 (2017).

124. J. Healy, D. Nicholson & A. Pekarek, *Should we take the gig economy seriously?*, 27 *Labour & Industry: a journal of the social and economic relations of work* 3, p. 4 (2017).

125. Cherry and Aloisi list Canada, Italy and Spain as three jurisdictions where this has already taken place. Cherry & Aloisi, *supra* n. 123, at p. 638.

Allowing for the accusation of being overly cynical, the author offers the opinion that not even our trust in what can be accomplished by simply amending the Commentary on the OECD Model will ensure an easy introduction of such novel concepts into tax treaties.

A further example of how changes in labour law are affecting tax treaties stems from the way in which the concept of employer is viewed. In common law countries, the notion of the plural employer model has been developing for some decades (stemming predominantly from US labour law and jurisprudence), wherein judges are allowed to determine that more than one employing entity may be recognized as jointly liable toward the employee by applying one of four tests to each of the entities: the common law right-of-control test, the economic reality test, the interference test, and the hybrid tests.¹²⁶ It is precisely in our modern economic setting that it becomes much more difficult to pinpoint the employer, as the employer functions may be subject to fragmentation.¹²⁷ Prassl offers the following definition of the term “employer”, tailored to the realities of the digital economy:

The entity, or combination of entities, playing a decisive role in the exercise of relational employment functions, and regulated or controlled as such in each particular domain of employment law.¹²⁸

In other words, as the plural employer model (joint employer model) becomes more relevant, the provisions of article 15(2) of the OECD Model (2017) may become increasingly difficult to apply as they rely on the concept of a single employer.

A retrospective approach may be proposed. The term “dependent personal services”, used in the OECD Model until 2000, and still used by the UN Model (2017), may perhaps be broad enough to encompass employment relationships in their purest form, as well as a wide variety of midway situations known as economically dependent workers. Naturally, it is not only the title of article 15 of the OECD Model that should be amended; its operative provisions must suffer the same fate, while care must be taken to insert at least a starting point definition of terms in the text of the norm itself, as the Commentary cannot be entrusted with the task of shouldering the entire burden of both legislation and interpretation on its own. At the very least, it needs a starting point from which elaboration can commence. Furthermore, this article cannot repeat its suggestion to delete the provisions of article 15(2) (b) and (c) of the OECD/UN Models, as they are based on the increasingly elusive notion of the single employer.

However, a diligent reader may be fully justified in accusing the author of superficiality. All of the aforementioned proposals rest on an untested and perhaps untrue premise that the reasons are known for wishing to grant employment income or income from dependent personal services a specific tax treatment, separate from other forms of income. Thus, the author must humbly end this section by agreeing with such a harsh accusation and siding with the idea that prior to any amendments of the relevant articles of the OECD/UN

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126. L. Corazza, *Who is an Employer*, Working Paper, CSDLE “Massimo D’Antona”.INT – 110/2014, p. 9 (Centre for the Study of European Labour Law “Massimo D’Antona” 2014).
127. *Uber B.V.* (2016), at para. 98.
128. J. Prassl, *Towards a Functional Concept of Employer*, A Thematic Working Paper for The Annual Conference of the European Centre of Expertise (ECE) in the field of labour law, employment and labour market policies: The Personal Scope of Labour Law in Times of Atypical Employment and Digitalisation, sec. 4 (Directorate-General for Employment, Social Affairs and Inclusion European Centre of Expertise, European Commission 2017); J. Prassl & M. Risak, *Uber, TaskRabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork*, 37 *Comp. Lab. L. & Pol’y J.* 3, p. (2016).

Models, it is necessary to first determine their role in a world that is quite different from the one in which they were initially drafted.

9. Conclusion

The speed of technological development and the impact this is having on the world's societies is yet to be fully understood. In the domain of taxes, discussions are taking place regarding the potential use of blockchain technology to render VAT systems more effective,¹²⁹ artificial intelligence to better apply tax treaties¹³⁰ and even tax robots.¹³¹ However, Schön makes an excellent point in calling for more caution:

One of the striking features of the current debate on the international taxation of the digitalized economy is the overwhelming consensus that the international tax regime needs to be reshaped. Political statements and scholarly publications are full of complaints about the traditional tax regime being built on an outdated notion of a “bricks and mortar” economy, which – so they say – doesn't meet the requirements of today's digitalized world.

But this is not a self-evident truth. Tax law, like any area of the law, is meant to express long-term value judgments and political agreements that have been transformed into legislative language. These norms show a general character and can be applied to new facts irrespective of changes in the real world, whether these are changes in technology or changes in the way business is done. One can refer to the age-old concepts of Roman law on warranties for deficient goods irrespective of whether these are sold in a village market or over the Internet. Legal regimes, unlike consumer software, do not need a regular update per se as technology and business progress. Rather, one needs a specific policy argument to amend the law, including tax law.¹³²

In this article, the author has attempted to scrutinize age-old concepts and instincts that guided the drafting of tax treaty provisions dealing with the taxation of employment income, and has tried to show that they are losing their merit, not only before technology itself, but more importantly before the ways in which global lifestyles are changing due, in part, to technology. To paraphrase Schön, we did not venture out to see whether consumer software is sold (as we all know it is), but if the village market is still there. And this article's conclusions are somewhat troubling:

- Tax residence of individuals can no longer be used as an impartial criterion for the determination of nexus with a particular jurisdiction. Tax residence is not only being offered as a tradable commodity, but the criteria currently relied on for ascertaining a deep personal link with a certain country (permanent home, family) are no longer of unquestionable integrity.
- The current understanding of how employment is exercised needs revisiting, as the concept of the workplace is disappearing before our very eyes. Perhaps it is enchantment with technological advancement that precludes seeing that the village market is still there, but unlike in the domain of corporate income taxation, a satisfactory debate on the issue of business (work) presence in connection with taxing individuals has yet to

129. A. Majdańska & K. Dziwiński, *The Potential of a Standard Audit File – Tax in the European Union: A Chance for Coordinated VAT Administration?*, 72 Bull. Intl. Taxn. 10, sec. 5.2.3. (2018), Journals IBFD.

130. B. Kuźniacki, *The Artificial Intelligence Tax Treaty Assistant: Decoding the Principal Purpose Test*, 72 Bull. Intl. Taxn. 9 (2018), Journals IBFD.

131. X. Oberson, *Taxing Robots? From the Emergence of an Electronic Ability to Pay to a Tax on Robots or the Use of Robots*, 9 World Tax J. 2 (2017), Journals IBFD.

132. W. Schön, *Ten Questions about Why and How to Tax the Digitalized Economy*, 72 Bull. Intl. Taxn. 4/5, sec. 1 (2018), Journals IBFD.

even begin. It must be noted that the results of this article's tests, with which the author was unable to theoretically justify the results obtained by application of article 15 of the OECD/UN Models to the digital nomad scenarios in section 6, lead in the way of conclusion to the idea that the village market is no longer there. At least not the one existing tax treaties were tailored to.

- The terms “employment” and “employer” can no longer be used with certainty of meaning, and it is not the difference in interpretation between the contracting states that is the main issue. We are facing a situation where we will not be able to say with certainty what they encompass from the perspective of each individual contracting state. Thus, the issue is not whether a particular state applied the appropriate article of a tax treaty, but which article it should apply.

The author has provided several proposals to address the determined deficiencies of the current framework for taxing employment income under tax treaties (introducing qualified treaty residence of individuals; deleting subparagraphs (b) and (c) in the second paragraph of article 15 of the OECD/UN Models and shortening the temporal limitation provided in its subparagraph (a); and replacing the term employment with a more clearly defined one of dependent personal services). However, it is in the call to dig deep into the reasons *why* we wish to award particular treatment to different types of income, *why* we choose certain criteria to justify imposing tax obligations, and *how* has the new digital reality impacted our thinking compared to the time when we took the trouble to answer these questions, that the author sees the essential contribution of this article. To answer these questions, we must rely on a multidisciplinary approach¹³³ and have the courage to step outside our normative tax technical comfort zone.

133. The tax literature will not help us understand that, e.g., nomadism is perhaps much more tailored to our psyche than the static urban environment, and will perhaps be the natural choice of the generation we are perhaps increasingly failing to comprehend. B.H. Hidaka, *Depression as the disease of modernity: Explanations of increasing prevalence*, 140 *Journal of Affective Disorders* 3, p. 206 (2012).