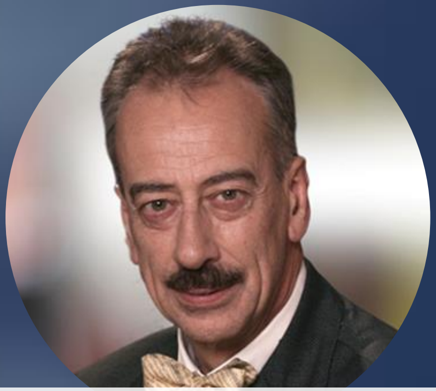
7TH IFA APAC REGIONAL CONFERENCE: 'THE FUTURE OF TAX IN ASIA PACIFIC REGION

International Fiscal Association
Hong Kong Branch

WORKSHOP 6

Growing Disparities Between Tax Residence Rules – Are We Heading to Global Anarchy?



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1. Welcoming and Overview of Dual Tax Residence	
A.	Opening Remarks and introduction of workshop panellists
B.	Domestic law rules for determination of tax residence
C.	Classical examples of dual tax residence situations
2. Deep Dive into Current State of Tax Residence Rules	
A.	Purposes of tax treaties and tie breaker rules
B.	Global tax treaty coverage
C.	Tie-breaker rules / Article 4.2 of the OECD Model Tax Convention
D.	Scenarios in the absence of a tax treaty
E.	Discussion of Singapore-USA and China-USA related cases
F.	Tax residence / domicile for estate tax purposes
3. Discussion and Interaction Session	
A.	Audience participation and panellists' further insights

1. Overview of Dual Tax Residence

Domestic tax law on residence >> tests commonly used in for full tax liability	
A Arithmetic	Number of days: typically at least/ over 183 days
FC Facts & Circumstances	Typically personal and (often to a somewhat lesser extent) 'business' circumstances
N Nationality	Except for the US, very few countries use this (citizenship) as basis for full tax liability

1. Overview of Dual Tax Residence

Domestic tax law on residence >> overlap of domestic residence rules of two (or more) countries	
A x A	May occur unless both countries use a days-of-presence test of at least 183 days
FC x A/FC	Quite common
N x A/FC	Rather common

A = arithmetic
FC = facts & circumstances
N = nationality

1. Overview of Dual Tax Residence

RESIDENCE FOR DOMESTIC TAX LAW & FOR TAX TREATIES

- Tax treaty between two states:
  - to resolve double taxation: by imposing a restriction either on the **R(esidence) state** of the taxpayer or on the **S(ource) state**

- "Residence" serves in tax treaties a different purpose than in domestic tax law

- Treaty has its own definitions of residence and of source

- But treaty definition of residence (Art. 4) refers to ***domestic* residence** definition
  - therefore: problem in case of domestic law dual residence, as treaty cannot function
  - priority needs to be given to one of the two residence states
  - tie breaker rules: for individuals: Art. 4.2 OECD Model (for companies: Art. 4.3)

1. Overview of Dual Tax Residence

CLASSICAL EXAMPLES OF DUAL RESIDENCE SITUATIONS

Indian Jurisprudence

- Fiscal Domicile will have to be determined with reference to the fact that if the contracting state with which his personal and economic relations are closer, he shall be deemed to be a resident of the contracting state in which he has a habitual abode.

  \- **CIT Vs PVAL Kulandagan Chettiar (2004) 267 ITR 654 (SC)**

- Assessee working in USA for three months and stayed the balance 9 months in India, salary earned in USA was held exempt - Article 16 (1) of DTAA based on split residency.

  \- **Raman Chopra (2016) 69 taxman.com 452 (Del- ITAT)**

- A resident of US working on Indian assignment, though stayed for more than 183 days in India was held to be resident of US on the basis of center of vital interest close to USA.

  \- **Shrikumar Sanjeev Ranjan (2019) 104 taxman.com 183 (Bang- ITAT)**

1. Overview of Dual Tax Residence

CLASSICAL EXAMPLES OF DUAL RESIDENCE SITUATIONS (CONT'D)

Indian Jurisprudence

- Though the taxpayer stayed more than 182 days in India, he shifted to Singapore on employment and his habitual abode with family continued in Singapore. Assessee was held to be a resident of Singapore and income earned in Singapore was not taxable in India

  - Sameer Malhotra (2023) 143 taxman.com 158 (Del - ITAT)

- Taxpayer shifted to Indonesia in the last three months of the Accounting year 2015-16 with his family on the basis of habitual abode and economic connection – held to be resident of Indonesia for the last three months – split residency

  - **Narinder Pal Singh (2023) 152 taxman.com 356 (Del - ITAT)**

- Tie breaker rule needs to be applied in a qualitative and holistic manner
- Facts of each case are unique and need to be analysed separately

2. Deep Dive into Current State of Tax Residence Rules

GLOBAL TAX TREATY COVERAGE

What if *NO* tax treaty has been concluded between R and S states?

- Close to 3,500 existing tax treaties
- There are 195 countries; if they all would have a tax treaty with one another: about 11,500 treaties
- Current 3,500 treaties cover over 90% of cross-border commerce
- Balance of **8,000 missing treaties**:
  - many unimportant (in category of HK or Singapore with Monaco)
  - some, however, between important trading partners: US-Hong Kong, US-Singapore

2. Deep Dive into Current State of Tax Residence Rules

ART. 4.2 OECD MODEL: TIE-BREAKER FOR INDIVIDUALS

(Art. 4.3: tie-breaker rule for companies)

Permanent home

If permanent home in both states: State with which personal and economic relations are closer: ***centre of vital interests***

If no centre of vital interests or no permanent home: ***habitual abode***

If no/two habitual abodes: ***nationality***

If no/two nationalities: ***MAP***

2. Deep Dive into Current State of Tax Residence Rules

SCENARIO IN THE ABSENCE OF A TAX TREATY

General Implications

- Dual residency needs to be resolved under respective domestic tax law provisions.
- Double taxation may not be avoided totally.
- **Closer Connection Test (CCT)** as per USA- Internal Revenue Code Sec. 7701 (b) (1) (B) is a model domestic law provision.
- **Unilateral tax credits** – will come to rescue.
- Non-treaty situations also create issues with respect to social security taxes etc.

2. Deep Dive into Current State of Tax Residence Rules

SCENARIO IN THE ABSENCE OF A TAX TREATY (CONT'D)

No Tax Treaty in the case of Singapore – USA

A) US citizen working in Singapore

- US Citizen becomes resident of Singapore once he is employed in Singapore.
- Singapore uses a **territorial tax system**. This means that individuals are taxed on only their Singapore-sourced income, while their world-wide income is largely exempt.
- US Citizen has to file tax return in both the jurisdictions.
- In the US, the US citizen will **apply provisions under the US tax law** like the foreign earned income exclusion, foreign housing exclusion and foreign tax credit – to reduce/eliminate double taxation.

2. Deep Dive into Current State of Tax Residence Rules

SCENARIO IN THE ABSENCE OF A TAX TREATY (CONT'D)

No Tax Treaty in the case of Singapore – USA

B) Singapore Citizen working in USA

- As per the US domestic law, **Closer Connection Test** (CCT) has to be applied to resolve dual residency, though he might become a resident in US under Substantial Presence Test.
- Under CCT the following criteria are examined:
  - Your permanent home
  - Your family
  - Your personal belongings such as cars, furniture, clothing, and jewellery
  - Your current social, political, cultural or religious affiliations
  - Your business activities (other than those that constitute your tax home)
  - The jurisdiction in which you hold a driver's license
  - The jurisdiction in which you vote, and
  - Charitable organizations to which you contribute.

2. Deep Dive into Current State of Tax Residence Rules

SIGNIFICANCE OF TAX RESIDENCY RULES OF INDIVIDUALS

1. Treated as tax resident in more than one jurisdiction
   = Taxed by more than one jurisdiction = Domicile tax

2. Not treated as tax resident in any jurisdiction = ?

3. Residency definition for income tax purposes
   vs.
   Residency definition for other purposes
   (e.g. legal/ immigration purposes, common reporting standard (CRS)

4. Residency = Domicile

2. Deep Dive into Current State of Tax Residence Rules

TAX RESIDENCY/ DOMICILE FOR ESTATE (INHERITANCE) TAX PURPOSES

- For Estate Tax (Inheritance Tax) – the definition of residency can be different
- For many jurisdictions, the concept of "domicile" is used, instead of "residence"
- For some jurisdictions, one's **citizenship is the most important criteria** of whether a deceased person's estate is subject to tax (estate tax / inheritance tax)
- For some jurisdictions, "domicile" of the deceased is the **overriding factor**
- What is "domicile" ?
  - ➢ A common definition of domicile is as living within a country with no definite present intent of leaving
  - ➢ Another common rule is that once an individual establishes the jurisdiction as their domicile, the individual will remain a domiciliary until a new domicile is established
  - ➢ "domicile" determination is usually through "facts & circumstances"
- Estate / inheritance tax can also be triggered by the **"situs" of the deceased's assets** (properties). "Situs" in many jurisdictions can trump "domicile" / residency of the deceased

2. Deep Dive into Current State of Tax Residence Rules

TAX RESIDENCY/ DOMICILE FOR ESTATE (INHERITANCE) TAX PURPOSES

- Tax treaties between countries on estate tax (inheritance tax) can help resolve problems of double taxation by use of various methods:
  - Tax jurisdiction based on citizenship / domicile / residency
  - Tax jurisdiction based on situs

United Kingdom

UK has concluded estate tax treaties with the following countries: France, India, Ireland, Italy, the Netherlands, Pakistan, South Africa, Sweden, Switzerland and the USA
(10 countries)

United States

USA has concluded estate/gift tax treaties with the following countries: Australia, Austria, Denmark Finland, France, Germany, Greece, India, Ireland, Japan, Italy, the Netherlands, South Africa, Sweden, Switzerland and the United Kingdom
(16 countries since 2022)

3. Discussion and Interaction Session

- Can a person be a "**resident**" for income tax purposes in a country, and yet not a "**domiciliary**" for estate tax purposes in the same country ?

- Or, Vice Versa