



TAXING REMUNERATION – PRINCIPLES AND PRACTICES

HOW DO TAX TREATIES AIM TO DEAL WITH CROSS-BORDER ISSUES

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OUTLINE

- ⦿ Article 15 – Income from Employment
- ⦿ Deferred remuneration and the 2014 update
- ⦿ Article 16 – Directors' Fees
- ⦿ Article 18 - Pensions



ARTICLE 15

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INCOME FROM EMPLOYMENT

1. 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.



COMMENTS ON ART 15(1)

- Which dominates – place of residence or place where employment exercised?
- Which should dominate? – is the underlying theory the benefit principle, or the opportunity principle, or the base erosion principle
- Place where employment is exercised – based on physical location of employee, but digital economy makes place where employment exercised irrelevant
 - Contrast: employee seconded abroad to work for 8 months on overseas project; employee works via video links, internet etc for 8 months on overseas project



ARTICLE 15

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INCOME FROM EMPLOYMENT

2. 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, and
- 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.



COMMENTS ON ART 15(2)

◎ REAL operation of Art 15

- Taxable only in place of residence if:
 - Present in host state less than 183 days
 - Employer is not a resident of host state
 - PE in host state does not bear cost of remuneration

◎ Problems

- Days of presence: cliffs' edge effect
- Who is the employer? – economic employer concept
- Is there a PE? Collateral damage of extending the PE concept
- When is remuneration borne by a PE?



ARTICLE 15

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INCOME FROM EMPLOYMENT

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



COMMENTS ON ART 15(3)

- ◉ Suitability in the 21st Century? No longer minimal numbers of people working for shipping and airline companies
- ◉ Why should taxation of employment income apply the same principle as Art 8 (profits of shipping and airline companies)?
- ◉ Problems of airline staff especially



TAX TREATY TREATMENT OF TERMINATION PAYMENTS

- ⦿ Discussion Draft June 2013 – 2014 Update to OECD Model
- ⦿ New paras 2.3 to 2.16 - examples
 - Late-paid salary – where employment exercised
 - Payment for unused holiday days – last year of employment
 - Payment in lieu of notice – where employee would otherwise have worked
 - Severance payment / redundancy pay – last year of employment
- ⦿ Serious outbreak of OECDitis



ARTICLE 16

ARTICLE 16

DIRECTORS' FEES

Directors' fees and other similar payments derived by a resident of a Contracting State in his capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State.



COMMENTS ON ART 16

- ⦿ Taxation where the company is resident
- ⦿ Why have a special article?
 - Large sums earned during short visits (like artistes and sportspersons)?
 - Can set their own remuneration (so can many others)?
- ⦿ Who are directors?

ARTICLE 18

ARTICLE 18

PENSIONS

Subject to the provisions of paragraph 2 of Article 19, pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment shall be taxable only in that State.



COMMENTS ON ARTICLE 18

- ◉ Suitability in 21st century? People drawing pensions much longer; greater freedom to retire abroad.
- ◉ Based entirely on benefit principle; but what about base erosion? Potential recapture of deduction.
- ◉ Conflict with other forms of deferred remuneration
- ◉ Lack of consensus



CONCLUDING COMMENTS

- ◉ Arts 15, 16 and 18 impact more people than BEPS
- ◉ Could a new consensus be found?
- ◉ Need to take account of changing patterns of work and mobility.