COMMENTS OF THE OCDE 2008 MODEL CONVENTION

ON ESTABLISHING THE TAX RESIDENCE

Lect. Mihail Antonescu Ph. D
Spiru Haret University
Faculty of Financial and Accounting Management
Craiova, Romania
Ligia Antonescu Ph. D
Gheorghe Chițu National Economic College
Craiova, Romania

Abstract: In the fiscal field, the competition between countries develops as a growing phenomenon, and results in the permanent improvement of the legislation to attract the investments and implicitly, the incomes to be taxed. Most developed countries set the limits of their tax jurisdiction, by defining the concept of resident. In the Romanian legislation, there are transposed the provisions of the OECD Model Convention on defining the residence, both in terms of residence and period of actual presence in Romania of a natural person. The importance of establishing the residence is particularly developed when double taxation occurs, as a consequence of dual residence.

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1. INTRODUCTION

For a correct application of the provisions of the double taxation avoidance Conventions, the countries which conclude such agreements have as the main instrument the Comments of the OECD Model Convention, updated in June 2008, bringing amendments and additions upon the comments on the definition of resident. The comments of the OECD Model Convention state that by the double taxation avoidance Conventions are not established standards to be enacted for the provisions on residency of the national legislation, so that the claims of full tax liability to be accepted between the Contracting Countries; in this respect, the Countries entirely count on their national legislation.

2. TAX RESIDENCE IN TERMS OF ROMANIAN LEGISLATION

Determining the tax residence is not a personal choice, but a fact which arises from the specific situation of each individual or each entity and the fulfillment of certain conditions. The definition of the resident from the OECD Model Convention definition refers to the concept of residence enacted in the national legislation.

In the Romanian legislation, the concept of resident is any Romanian legal person, any foreign legal person which carries out the effective management in Romania, any legal

person with its registered office in Romania, established under European legislation and any resident natural person.

2.1. Determining the residence for natural persons

According to the Tax Code, a resident natural person is "any natural person who meets at least one of the following conditions:

1. resides in Romania;
2. the center of the vital interests of the person is located in Romania;
3. is present in Romania for a period or more periods exceeding in aggregate 183 days, during any period of 12 consecutive months, which ends in the aimed calendar year;
4. is a Romanian citizen working abroad, as official or employee of Romania in a foreign state.

By way of exception from the provisions of the letters a) - d) is not a resident natural person a foreign citizen with a diplomatic or consular status in Romania, a foreign citizen who is an officer or employee of an international and intergovernmental organization registered in Romania, a foreign citizen who is an officer or employee of a foreign state in Romania, nor the members of their families".

Regarding the residence, one of its definitions is found in the provisions of the art. 13 of the Decree 31/1954: „The residence of the natural person is where the person has its steady or main residence". Thus, the address is an attribute of identification of the person, which distinguishes it in the space, by indicating a place having this legal significance.

The center of vital interests is a complex concept and involves the determination of the country in which the natural person has the closest personal and family connections.

In order to be taxed in Romania for all its revenues, local or international, a natural person will have to meet for at least three consecutive years one of the following residence conditions: the center of the vital interests of the person is located in Romania or the person is present in Romania for a period or more periods exceeding in aggregate 183 days, during any period of 12 consecutive months, which ends in the aimed calendar year.

Only in the fourth year it will become a permanent tax resident in Romania and will pay taxes in Romania for all its revenues.

The definition of resident under the art. 4 in conjunction with the provisions of the art. 15 "Incomes from wages" of the OECD Model Convention inspired the Romanian law giver in drafting the definition of the resident natural person.

2.2. Determining the residence for legal persons

The OECD Model Convention provides in the article 4, paragraph 3, that when determining the residence of legal persons to consider the place of the effective management, and the new provisions of the Tax Code define the legal persons, as it follows: Romanian legal person (any legal person that was established under the laws of Romania), legal person established under the European law (any legal person established under the conditions and mechanisms provisioned by the European regulations) and foreign legal person (any legal person that is not a Romanian legal person and any legal person established under the European laws, which has no registered office in Romania).

3. THE CONCEPT OF RESIDENT IN TERMS OF THE OECD 2008 COMMENTS

The double taxation avoidance conventions recognize the sovereign right of each country to establish the residency criteria for the persons who develop activities generating revenues. OECD Model Convention and the Comments to it bring clarifications to solve

the various conflicts that may arise in determining the tax residency, at the same time presenting various aspects that have been met in the international tax practice.

As a general rule, according to the art. 4 "Resident", the term "resident of a Contracting Country" means any person who, under the laws of that Country, is liable to pay tax in that Country, on grounds of domicile, residence, place of management and any other similar criterion, but excluding those persons subject to tax in that Country only for the revenue obtained from sources in that Country or for the stock located in that Country.

OECD comments present the cases where a clear definition of the concept of resident is required to solve the conflicts that arise when, under the national legislation, one or both Contracting Countries argue that the person is resident in its territory:

1. to determine the personal scope of application of the Convention;
2. in solving the cases in which double taxation occurs, also as a consequence of the dual residence;
3. in solving the cases in which double taxation occurs, also as a consequence of taxation in the country of residence and in the source country or in the site.

Concerning the cases listed above, it can not be reached a solution by referring to the concept of residence enacted in the national legislation of the respective Countries, but special provisions must be established in the Convention to decide which of the two concepts of residence will be given priority.

In order to solve the dilemma that occurs in case of dual residence, respectively the case when the person is a resident of both Contracting Countries, there were established the following criteria of determining the residency, applied in the following order:

1. the person shall be considered a resident of the Country where it has a permanent home, at its disposal; if it has a permanent home in both Countries, it will be considered resident only of the Country with which his personal and economic relations are closer (the center of the vital interests). In order to solve the possible conflicts that may arise between the laws of the two countries, the first criterion that will be considered is owning any form of housing adapted for the permanent use of the person concerned, which means it will not be considered a home used occasionally or for a short period of time. If the person has a permanent home in both Contracting Countries, it must be analyzed the situation to determine with which of the two Countries that person has closer personal and economic relations, meaning there will be also taken into account other criteria: family, its social relations, occupations, cultural or of other kind activities, business place, and so on.
2. if the Country where the person has its center of vital interests can not be determined, or if that person does not own a permanent home in neither of the Countries, it shall be considered that it is a resident of the Country in which it has its usual address;
3. if the person has its usual address in both Countries or in neither of them, it shall be considered that the respective person is a resident of the Country of its nationality;
4. if the person has the nationality of both Countries or of any of them, the competent authorities of the Contracting Countries shall settle this matter amicably.

Therefore, if the first criterion is not applicable to determine the residency, the next shall be applied, repeating this algorithm up to the last criterion, respectively the amicable procedure provided for in the Article 25 of the Model Convention.

Paragraph 3 of the Article 4 of the Model Convention clarifies on the establishment of the residence of other persons other than natural persons, respectively companies and other bodies, whether legal persons or not: "When, in accordance with the provisions of the paragraph 1, another person other than the natural person is a resident of both Contracting Countries, it shall be considered that the respective person is resident

only of the Country in which it has its place of effective management". At the same time, the Comments of the Model Convention define the term of place of effective management as being "the place where the main administration is performed and where the business decisions are made, necessary for the activity management of respective entity, as a whole entity". The cases of dual residence found in practice, among other persons other than the natural persons are very rare, and some countries have expressed their option that they are treated individually, the possible conflicts being solved according to each case.

Given these issues, a proposal was introduced in the OECD 2008 Comments to replace the para. 3, Art. 4: "When, in accordance with the provisions of the para 1, a person other than the natural person is a resident of both Contracting Countries, the competent authorities of the Contracting Countries shall endeavor to determine by mutual agreement the Contracting Country of which resident the respective person shall be considered, within the meaning of the Convention, taking into account the place of effective management, where it is registered or otherwise incorporated, and of any other relevant factors. In the absence of such a mutual agreement, that person will not be entitled to any of the exemptions or immunities from tax under this Convention, only to an extent and in a manner as may be approved by the competent authorities of the Contracting Countries".

4. CONCLUSIONS

Drafting some clear provisions to define the concept of resident has a special importance, given the permanent preoccupation of the countries to tax the revenues obtained their residents. The double taxation avoidance conventions are not intended to amend the provisions of the national legislation of the Contracting Countries, which regulate the conditions under which a person will be treated in terms of taxation as a "resident", but seek to solve some conflicts that may arise between the two countries, in determining the residence of a person.

From the performed analysis, it is noted that, although Romania is not an OECD member, the Model Convention and the Comments on it, besides their role in the application and interpretation of double taxation avoidance conventions concluded with various countries, serve as guidelines in interpreting the internal legislation regarding the issue of determining the residence.

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