Tax Treaty Individual Dual Residence Tiebreaker Rules: Interpretation and Application – Timothy Borg Olivier

The scope of this research paper seeks to address the interpretation of the concepts used in the tie-breaker rules for individuals under Article 4 (2) of the OECD Model Convention. The source of the problems attributed to understanding such concepts is that the Model Convention provides no definition to the terms used, and furthermore, the OECD Commentaries on this provision are brief and at times ambiguous. While Article 3 (2) of the OECD Model Convention provides that undefined terms in the Convention should be defined in accordance to domestic law, it is internationally agreed that this should not be the case with the terms used in resolving the residence of a taxpayer. It is held that this is a situation where “the context otherwise requires” and therefore an international and autonomous understanding should be given to such terms.

As there is not much guidance provided by the Organisation for Economic Co-operation and Development (hereinafter referred to as OECD), there has been a lot of reliance on the writings of scholars on such matters. One particular article written by John Avery Jones et al. has been given particular importance, however this article was written in 1981, almost forty years ago. This paper therefore seeks to see whether the concepts put forward in this article are still relevant in today’s world amidst the increases in globalisation and mobility. It is now more likely for individuals to find themselves resident in multiple countries, and this increases the importance of having a common understanding to the concepts used in the tie-breaker rules.

Finding an international understanding to some of the concepts used in the tie-breaker rules for individuals is fundamental in today’s world, and in the absence of such rules, taxpayers will become exposed to double taxation. It will be seen whether this importance warrants a revision of the current OECD Commentaries on the provision in order to facilitate their understanding.

Although the article written by Avery Jones et al. is nowadays almost forty years old, it nevertheless remains extremely relevant and still provides adequate guidance to the interpretation of the concepts used in the tie-breaker rules for individuals. This is evidenced by the fact that many scholars, and even Courts still make reference to the concepts put forward in this article.

After analysing the various tie-breaker rules, it can be concluded that each rule has its own controversial aspect, which has led to different interpretations being given by scholars and courts alike. With regard to the availability of a permanent home, one of the main questions which arises is whether a secondary home could qualify as a permanent home for the purposes of the tie-breaker rule. In this regard, it is generally held that it is impossible to generalise on all secondary homes and the nature in which this home is kept available must be examined. In general, if the home is available to the individual at all times, and it can be shown that such individual exercises control over the home, then it could be concluded that he has a permanent home available to him for the purposes of this first tie-breaker rule. An interesting argument which surfaced was the possible use of this concept in tax planning. Since this test is a very factual one, it can easily be manipulated so that the taxpayer will effectively choose his residence. In practice, individuals are no longer using such planning techniques for tax avoidance purposes and generally prefer to invest through other legal forms. Nonetheless, BEPS Action 6 aims to strengthen the impact of domestic anti-avoidance provisions which could tackle such planning opportunities, by proposing that tax treaties will not limit the applicability of such anti-avoidance provisions.

The main issue relating to the concept of “centre of vital interests” relates to whether preference should be granted to either personal or economic relations. Much of the debate surrounding this issue is caused by the OECD Commentaries themselves, which provide that “personal acts” should be given importance.
Avery Jones et al. originally took this to mean that personal relations should be given priority; however, since then it has generally been held that equal weight should be given to the personal and economic circumstances. This is supported by the history of the provision, which has previously rejecting the inclusion of the test based solely on personal relations, as well as the wording of the provision itself, which provides that both personal and economic relations are to be considered. Giving more importance to the personal relations of the individual may also defeat the purpose of the tie-breaker rules which seek to attribute residence to the State with which the individual has closer relations. An individual’s centre of vital interests is very subjective and it does not seem right to have a specific rule, such as that granting preference to personal relations, applicable in all cases.

The controversial aspect of the habitual abode test is whether applying a number of days of presence test is enough in determining whether the individual has his habitual abode in a particular country. It is often held that this test is more than simply comparing the number of days spent in the two Contracting States, and the individual must instead show some sort of connection to the Contracting State. Such reasoning is also relevant in accordance with the principal aims of the tie-breaker rules, and residence must be held to be in a Contracting State with which the individual has a greater attachment. Finally, the tests relating to “nationality” and “mutual agreement procedure” do not give rise to any issues of interpretation as both concepts are defined in the Convention.

Nowadays it is becoming increasingly common for individuals to be considered resident in more than one country, however few of these instances are international or used as a tool for anti-avoidance, and are generally caused by the individual moving to a new country for employment purposes. The problems which dual-residents face are caused by the lack of a harmonized policy with regards to the definition of residence, and this allows such individuals to be considered resident in multiple States. Given the consequences of dual residence on the taxpayer, it is fundamental that something is done to ensure that such issues are either avoided altogether, or there is a speedy resolution to such issues.

I carried out the above mentioned during the past scholastic year while reading a Master of Advanced Studies in International Taxation Law at the International Tax Centre, University of Leiden. Thanks to the Master it! Scholarship, I have been able to undertake these studies at such a reputable university together with other professionals from all around the globe. This has been an enriching experience which will definitely help me further advance in my professional career.

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