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The Taxation of *'Digital Nomads'* and the *'3 W's'*: Between Tax Challenges and Heavenly Beaches

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Work mobility is not something new, but it certainly received an important boost with the COVID-19 pandemic as many people began working remotely which reflected on their lifestyle. In this context, the objective of the present study is to analyse the challenges imposed by what is known as 'digital nomads' *from the exclusive perspective of individual taxation. The first part aims to understand the first* 'W'*, i.e., who the* 'digital nomads' *are and the factors that favour the choice for this type of work. Subsequently, it examines the impacts caused by the* 'digital nomadism' *in determining the tax residence (second* 'W' *– where) and presents the measures, albeit incipient and indistinguishable, adopted by some countries in relation to this phenomenon. The third section delves into the taxation of income obtained by* 'digital nomads' *through either an employment relationship or the provision of services (third* 'W' *– what). Based on the analysis of examples and the presentation of some alternatives, this study seeks to demonstrate the need to adapt the tax residence rules at both of the levels of domestic law and double tax treaties (tiebreaker rules). The rules on the taxation of income from employment and the provision of independent services also demand modifications that detach them from the strict need for a physical presence.*

Keywords: 'Digital nomads', work mobility, international taxation, tax residence, employment income, digital economy.

1 Introduction

The present article examines the tax challenges arising from the growth of what is referred to as *'digital nomads'*. This group can work from anywhere in the world and often remains for brief periods in each jurisdiction which consequently incites questions regarding their tax residence and the taxation of their income. It is worth mentioning that this study focuses exclusively on individual taxation. The challenges imposed on corporate taxation, such as the characterization of a permanent establishment (PE) of the employer, are not discussed herein and may possibly be the subject of a separate article.

In this context, the present study is divided into four parts. It initially intends to briefly analyse the context of work mobility enhanced by the COVID-19 pandemic that consolidated different types of work and is generally associated with new and healthier lifestyles.[1] This part also aims to understand the first *'W'*, i.e., who the digital nomads are.

The following sections seek to address two specific tax challenges arising from the activities carried out by digital nomads and present some alternatives adopted by different countries that allegedly deal with such a reality. First, tax residence as a nexus for the exercise of taxing rights is challenged by the high mobility of this group (second *'W'*-where). Another issue concerns the taxation of the income obtained by digital nomads either as employees or as independent service providers and the possible modifications necessary to adapt the corresponding treaty provisions to this new reality (third *'W'*-what).

Finally, this study presents a number of conclusions in the sense that physical presence as a relevant criterion for the definition of tax residence and the taxation of employment income and income from the provision of services must be relativized. This measure is essential for adapting the international tax system not only to the current reality of legal entities but also of the individuals themselves.

2 *'Digital Nomads'*: Who are they?

The globalization process and the technological development directly contributed to the emergence of new

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1 *See* European Parliament, *The Impact of Teleworking and Digital Work on Workers and Society: Special Focus on Surveillance and Monitoring, as Well as on Mental Health of Workers* 38–53 (2021), https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662904/IPOL_STU(2021)662904_EN.pdf (accessed 27 Jul. 2022).

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business models that do not require a physical presence.[2] In this context, uncertainties emerged about how to tax these activities considering that physical presence is still a relevant criterion in international tax law.

Despite the initiatives promoted by international organizations, tax administrations, and academia regarding the corporate taxation of the digital economy, the taxation of individuals received little attention.[3] However, it is important that studies related to corporate taxation be accompanied by the assessment of the impacts of the digital economy on the taxation of individuals. After all, as argued in another study,[4] the individual is the one who ultimately pays the taxes.

The work mobility that was effectuated by the COVID-19 pandemic allowed the consolidation of different types of work that do not require a physical presence on specified premises and even within the employer's jurisdiction.[5] Normally, four models are mentioned: *(1)* home-office; *(2)* atypical forms of employment; *(3)* decentralization of jobs; and *(4)* digital nomadism. For the purposes of this study, it is important to analyse only the latter model exclusively from the perspective of individual taxation. That is, the impacts on the taxation of legal entities are beyond the scope proposed herein (for example, the characterization of a PE or an employer's fixed base).[6]

An informal survey entitled *'Digital Nomads Census'* gathered some interesting data about the behaviour of digital nomads.[7] This group is primarily between twenty-five and thirty-four years old; selected Asia (45%) as a location to work remotely with a preference for Indonesia and Thailand; and approximately half of those interviewed responded that they moved to a new location after a few months. In addition, the survey identified that digital nomads are commonly software engineers, writers, and consultants who introduce themselves as independent professionals.

In this context, digital nomads consist of an emerging group of nomadic workers whose motivation generally derives from the association between remote work and an adventurous and healthier lifestyle. These individuals are nationals of a particular state (A), work remotely from another country (B), and remain there for a very brief period. They usually have an employment relationship with an employer in another jurisdiction (C) or provide services independently for companies or individuals who are resident in other states. Stated differently, the only link with the place where they work remotely relies on their short stay in that country. In this regard, it is important to distinguish digital nomads from the classic expatriate model since the latter remains for a considerable period in a given jurisdiction and seeks to establish personal and professional roots in their new country.

This reality has been a direct or indirect subject of different measures taken by many countries all over the world. As identified by the World Economic Forum in 2016,[8] several countries have introduced a type of residence and citizenship market that allowed individuals to acquire new residences and citizenships through simplified processes and tax benefits.[9] In any case, the high costs involved that require a minimum investment between EUR 35,000 (Latvia) and EUR 10 million (France) led to the conclusion that, initially, only high-income people have access to this alternative work and lifestyle.

However, *'digital nomadism'* is no longer a niche restricted to wealthy people. Svetislav Kostic points out a number of elements that favour the growth of this phenomenon. The first is technological development (not only of technology integration but also the means of travel and financing). The second is that social and legal developments (*'co-living environments'*) have changed how people approach their work lives and routines. Third, it represents a positive alternative to a sedentary lifestyle (abandonment of a *'sedentary way of thinking'* – the notion that a person's development is always connected to the family and to a physical place).[10] In addition to that, accommodation facilities (Airbnb, CouchSurfing), the expansion of

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[2] *See* OECD, *Addressing the Tax Challenges of the Digital Economy*, Action 1 – 2015 Final Report 142–143 (Paris: OECD Publishing 2015), https://read.oecd-ilibrary.org/taxation/addressing-the-tax-challenges-of-the-digital-economy-action-1-2015-final-report_9789264241046-en (accessed 7 Apr. 2022).

[3] *See* Rita de la Feria & Giorgia Maffini, *The Impact of Digitalisation on Personal Income Taxes*, (2) Brit. Tax Rev. 154–168 (2021).

[4] *See* Leonardo T. Pignatari, *Revisitando o Imposto de Renda das Pessoas Jurídicas no Brasil: origens, justificativas e métodos de integração*, (46) Revista Direito Tributário Atual 285–288 (São Paulo: IBDT 2020).

[5] *See* McKinsey Global Institute, *The Future of Work After COVID-19* (2021), https://www.mckinsey.com/featured-insights/future-of-work/the-future-of-work-after-covid-19 (accessed 29 Jul. 2022).

[6] Regarding the different forms of work and the tax impacts on legal entities, *see* Giorgio Beretta, *'Work on the Move': Rethinking Taxation of Labour Income Under Tax Treaties*, 5 (2) Int'l Tax Stud. (2022), Journal Articles & Opinion Pieces IBFD (accessed 27 Jul. 2022), s. 2; Andrés Báez Moreno, *COVID-19 and Fiscal Policies: Unnecessary and Yet Harmful: Some Critical Remarks to the OECD Note on the Impact of the COVID-19 Crisis on Tax Treaties*, 48(8) Intertax 814–830 (2020), https://kluwerlawonline.com/journalarticle/Intertax/48.8/TAXI2020080 (accessed 7 Apr. 2022).

[7] *See* Workers of the World: Data on Digital Nomads, http://digitalnomadhelp.com/infographic/# (accessed 7 Apr. 2022).

[8] Joe Myers, *Countries Where You Can Buy Citizenship*, World Economic Forum (28 Jul. 2016), https://www.weforum.org/agenda/2016/07/countries-selling-citizenship/ (accessed 7 Apr. 2022). *See also* Judith Gold & Ahmed El-Ashram, *A Passport of Convenience*, 52(4) Fin. & Dev. (2015), https://www.imf.org/external/pubs/ft/fandd/2015/12/gold.htm (accessed 7 Apr. 2022).

[9] *See* Alisson Christians, *Jumping the Line or Out of the Net? Tax and the Immigration Investor*, 88 Tax Notes Int'l (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3099619 (accessed 7 Apr. 2022).

[10] Svetislav V. Kostić, *In Search of the Digital Nomad – Rethinking the Taxation of Employment Income Under Tax Treaties*, 11 World Tax J. 207–208 (2019), Journal Articles & Opinion Pieces IBFD (accessed 27 Jul. 2022).

low-cost airlines (Ryanair, EasyJet, Wizz Air), and the reduction of troubles in life that are closely linked with health problems, such as a burnout,[11] have contributed to the *'digital nomadism'*. Platforms such as the *'Digital Nomad World'*[12] and *'Nomad List'*[13] were even created to help this group.

The search for an *'office on the beach'* received an important boost with the COVID-19 pandemic during which many individuals worked directly from their homes or from other locations as travel restrictions were being enforced. During this period, people were afforded the opportunity to reflect on their lifestyles and, consequently, on their work routine. Some individuals began to work from other locations with the flexibilization of governmental measures and even moved to different countries thereby joining the category of what is being referred to as *'corporate nomads'*.[14]

Nonetheless, these individuals created some complex tax challenges by choosing a new lifestyle. Businesses can be operated and activities carried out on a heavenly beach just a *'click'* away from the employer's premises and/or jurisdiction. This revolution generated by the *'digital nomadism'* forces rethinking of physical presence as a relevant criterion for determining the tax residence and the taxation of employment income, overflowing the fields of corporate taxation to reach the taxation of individuals.

3 'DIGITAL NOMADS': WHERE DO THEY RESIDE?

Tax residence represents an important criterion for international taxation and constitutes the place where the taxpayer's personal circumstances can theoretically be better observed (ability to pay principle). Residents are taxed on a universal basis (income earned within and outside the territory), and non-residents are taxed only on income earned within the territory. Furthermore, double tax treaties can only apply to residents of one or both contracting states, and the OECD Model Convention (OECD-MC) has historically favoured taxation in the residence state.[15]

Normally, residence is closely linked to physical presence as its characterization is based on elements such as domicile, length of stay (183-day rule), place of effective management, centre of vital interests (personal and economic relationships), and permanent home, among others. This connection is challenged by the mobility of companies[16] and individuals who perform their activities without the need for physical presence or with a very limited physical presence in a certain jurisdiction.

The COVID-19 pandemic significantly affected such mobility so that many people began working remotely and often from a different location and jurisdiction than the usual and traditional *'workplace'*. In this regard, the OECD expressed the understanding on two occasions that 'it is unlikely that the COVID-19 situation will create any changes to an entity's residence status under a tax treaty'.[17]

At that time, the OECD was working with two scenarios. The first refers to a person who is temporarily away from home, on vacation, or at work for a few weeks and is trapped in the host country due to restrictions imposed by governments. He eventually obtains tax residence in that jurisdiction under its domestic legislation. Another situation concerns a person who is working in a country, has acquired residence status in that jurisdiction, but temporarily returns to his home country due to COVID-19. In the latter case, the individual may never have lost his resident status in the work country under its domestic law, or he may regain residence status on the return to his home country.

In its two statements, the OECD ruled out the tax implications in both the first and second situations. It concluded that, it is unlikely that a person would be considered a resident for the purposes of the treaty even if he was considered a resident under domestic law in light of the application of what is known as the *'tie-breaker rules'*. In accordance with this reasoning, the impossibility of a person to travel back to their home jurisdiction due to restrictions such as public health measures imposed by different governments should not affect the person's residence status for the purposes of double tax treaties. Some countries have

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[11] WHO, *Burn-Out an 'Occupational Phenomenon': International Classification of Diseases* (28 May 2019), https://www.who.int/news/item/28-05-2019-burn-out-an-occupational-phenomenon-international-classification-of-diseases (accessed 7 Apr. 2022).

[12] https://digitalnomads.world/ (accessed 7 Apr. 2022).

[13] https://nomadlist.com/ (accessed 7 Apr. 2022).

[14] *See* Claudio Fernández-Aráoz, *The Rise of the 'Corporate Nomad'*, Harvard Business Review (30 Mar. 2022.), https://hbr.org/2022/03/the-rise-of-the-corporate-nomad?utm_campaign=hbr&utm_medium=social&utm_source=linkedin (accessed 7 Apr. 2022).

[15] OECD, *Model Tax Convention on Income and on Capital 2017* (Paris: OECD Publishing 2017), https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2017-full-version_g2g972ee-en (accessed 7 Apr. 2022).

[16] *See* Georg W. Kofler, Gunter Mayr & Christoph Schlager, *Taxation of the Digital Economy: 'Quick Fixes' or Long-Term Solution?*, 57 Eur. Tax'n 12 (2017), Journal Articles & Opinion Pieces IBFD (accessed 27 Jul. 2022); Robert J. Danon, *Can Tax Treaty Policy Save Us? The Case of the Digital Economy, History of Tax Treaties: The Relevance of the OECD Documents for the Interpretation of Tax Treaties* 75–89 (Thomas Ecker & Gernot Ressler eds, Viena: Linde 2011); Peter Hongler & Pasquale Pistone, *Blueprints for a New PE Nexus to Tax Business Income in the Era of the Digital Economy*, WU International Taxation Research Paper Series (2015), https://epub.wu.ac.at/4509/4/SSRN-id2591829.pdf (accessed 7 Apr. 2021).

[17] *See* OECD, *Updated Guidance on Tax Treaties and the Impact of the COVID-19 Pandemic* 11–14 (21 Jan. 2021), https://www.oecd.org/coronavirus/policy-responses/updated-guidance-on-tax-treaties-and-the-impact-of-the-covid-19-pandemic-df42be07/ (accessed 7 Apr. 2022); OECD, *OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis* 6–7 (3 Apr. 2020), https://www.oecd.org/coronavirus/policy-responses/oecd-secretariat-analysis-of-tax-treaties-and-the-impact-of-the-covid-19-crisis-947dcb01/ (accessed 7 Apr. 2022).

provided specific guidance for these situations, such as Australia,[18] Ireland,[19] and the United Kingdom.[20]

In this context, the OECD relies on the existence of a tax treaty between the two countries (which may not be the case) and minimizes the lasting impacts of labour mobility in the post-pandemic world.[21] A certain *'mea culpa'* is identified in the organization's second manifestation whereby it states that 'a different approach may be appropriate however, if the change in circumstances continues when the COVID-19 restrictions are lifted'.[22]

This *'change in circumstances'* has certainly already occurred. The expansion of digital nomads reinforces the need to adapt the international tax system to this new reality not only in the field of legal entities but also for individuals. They usually remain for a very brief period of time in the same jurisdiction and thus fall outside the residence rules and the double tax treaties (if any) of many countries.

The European Economic and Social Committee (EESC) has recently recognized the particular tax challenges derived from cross-border teleworking after the COVID-19 pandemic in relation to both 'the taxation of wages and the taxation of company profits'.[23] These challenges constitute a risk to an efficient single market since they create double taxation and administrative burdens for taxpayers (employees and employers) and tax administrations. The committee focuses on teleworking within the European Union but not specifically on digital nomads and the global particularities. Nonetheless, it accentuates the importance of updating the taxation systems 'to answer the needs of today's work environment' and acknowledges a 'need to also review international taxation rules for individuals' which requires a high level of coordination. In this regard, taxation should not become an obstacle for hiring employees from outside the employer's jurisdiction inasmuch as it is contrary to the EU treaties and the free movement of workers.[24]

A simple example can illustrate such challenges. Imagine that Laura is a national of State A and leaves her country permanently (therefore, loses her resident status) to live a digital nomad life, but her family remains in State A. She does not intend to return to her home country because she fell in love with the remote work and the freedom to visit heavenly places. In this sense, Laura decides to work remotely from different places around the globe (States C, D, E) and has only three rules, i.e., to not spend more than ninety days in the same country, use tourist visas, and never work in the same jurisdiction as her employer (resident of State B). In this scenario, Laura is unlikely to be considered a tax resident of States C, D, and E considering the brief amount of time spent in these jurisdictions. Such a conclusion brings a curious situation in which she is not a resident of any of these states for the purposes of their respective domestic legislation, and the existence of a double tax treaty between the mentioned states is uncertain. Even in the case of a tax treaty, the conventional clauses are only applicable if there is a dual residence conflict, that is, if the digital nomad is considered a tax resident of both contracting states according to its domestic legislation. However, this does not seem to be the case in this example.

Aware of this phenomenon, many countries are implementing short-stay visa programs that intend to relieve digital nomads from complying with tax obligations in an attempt to *'legalize'* and attract this group.[25] However, a more comprehensive examination of these regimes indicate that they are mostly targeting a different object and creating a new level of tax competition.

3.1 *'Digital Nomads' Regimes: New Race to the Bottom?*

Estonia introduced an *'e-residence'* regime in 2014.[26] It allows people from different parts of the globe to open and operate a business as well as access government services online without the need to be physically present in the Estonian territory. On one hand, it is a mechanism to

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[18] The Australian Government has pointed out that a non-resident person who is in Australia temporarily for a few weeks or months because of COVID-19 will not become an Australian resident for tax purposes as long as they usually and permanently live abroad and intend to return there as soon as possible. (*See* Australia, https://www.ato.gov.au/General/COVID-19/Support-for-individuals-and-employees/Residency-and-source-of-income/%23ChangeoftaxresidencyduetoCOVID19 (accessed 8 Apr. 2022).

[19] Ireland mentions *'force majeure'* circumstances to remove tax residence, www.revenue.ie/en/corporate/communications/covid19/compliance-with-certain-reporting-and-filing-obligations.aspx (accessed 8 Apr. 2022).

[20] The United Kingdom clarified that, while a person may become a resident of the country under domestic law, their residence for treaty purposes will not change due to a person's temporary displacement (*see* United Kingdom, https://www.gov.uk/hmrc-internal-manuals/residence-domicile-and-remittance-basis/rdrm13200 and https://www.gov.uk/hmrc-internal-manuals/residence-domicile-and-remittance-basis/rdrm13410 (accessed 8 Apr. 2022)).

[21] For criticism towards the OECD manifestation, *see* Moreno, *supra* n. 6.

[22] OECD (2021), *supra* n. 17, at 14.

[23] European Economic and Social Committee, *Taxation of Cross-Border Teleworkers and Their Employers* (2022), para. 2.4, https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/taxation-cross-border-teleworkers-and-their-employers (accessed 27 Jul. 2022).

[24] *See* European Commission, *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee: Removing Cross-Border Tax Obstacles for EU Citizens*, COM(2010) 769 final, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0769&from=EN (accessed 27 Jul. 2022); European Commission, *Directorate-General for Taxation and Customs Union, Ways to Tackle Cross-Border Tax Obstacles Facing Individuals Within the EU: Report of Expert Group*, Publications Office 14–24 (2016), https://data.europa.eu/doi/10.2778/774727 (accessed 27 Jul. 2022).

[25] *See* Beretta, *supra* n. 6, s. 2.3.

[26] Republic of Estonia, *Become an e-Resident*, https://e-resident.gov.ee/become-an-e-resident/ (accessed 7 Apr. 2022).

attract not only businesses but also individuals (digital nomads). On the other, it creates a competition between states for investments and people through granting a resident status. This scheme establishes an extremely simplified, low-cost procedure (EUR 100–120 fee) that takes three to eight weeks.

Although the program primarily focuses on entrepreneurs who work digitally and want to open/operate a business in the European Union, it also applies to 'digital nomads seeking a minimalist lifestyle and true freedom from a fixed location'. In 2020, Estonia implemented the *'Digital Nomad Visa'* that allows digital nomads to live in the Baltic country and legally work for their employer or their own company registered abroad for up to one year.[27] Its objective is to prevent these individuals from working from a certain location using only a tourist visa. To facilitate the process, Estonia has published a guide for digital nomads with general information about this lifestyle, advantages, disadvantages, and tips on how to face this *'adventure'*.[28]

The application for this special visa depends on a number of conditions that are in accordance with the definition of digital nomads provided in the previous section. The individual must demonstrate the ability to work remotely using telecommunications technology; present an active employment contract with a company registered outside Estonia or conduct business through their own company registered abroad, or work as a freelancer for clients outside Estonia. In addition, a minimum income threshold must be met during the six months prior to the application (currently, the monthly income threshold is EUR 3,504.00 – net of tax).

Similarly, Croatia introduced the *'temporary stay for digital nomads'* regime in 2020 whereby an exemption is granted to digital workers who relocate to the shores of that country for up to one year.[29] Under Croatian law, digital nomads are third-country nationals who are employed or work via communication technology for a company or their own company that is not registered in Croatia or do not work or provide services to employers in Croatia.[30] A temporary stay is granted for a non-extendable period of up to one year. Close family members of a digital nomad may also receive a temporary stay in that European country.

In 2021, Greece also allowed European and non-EU workers to transfer their tax residence to its territory and granted them a 50% discount on income tax of Greek source for up to seven years.[31] After observing a trend in the search for its heavenly waters and white sand beaches by those who were working from home during the COVID-19 pandemic, Seychelles, an archipelago of 115 islands in the Indian Ocean, introduced the system *'Seychelles Workcation'*.[32] This regime provides facilities and discounts on long-term accommodation, access to health services, and authorization to stay for a long period of time. It is applicable for thirty days up to one year, requires only a valid passport, documents as proof of being an employee/business owner, proof of income or wealth, and a valid medical and travel insurance policy. There is also an exemption from personal income tax.

More recently, Costa Rica joined this trend and implemented a special regime for digital nomads. It offers a visa valid for one year that is renewable for the same period if the visa holder has spent 180 days or more in Costa Rica during the first year.[33] The only requirements are proof of a minimum stable income of USD 3,000 per month (USD 4,000 for a family) for the previous year and proof of health insurance for the year concerned. The holders of this visa are exempt from Costa Rican income taxes and import taxes on their work equipment brought into the country for their stay.

Likewise, Spain has recently announced its intention to introduce a special digital nomad visa by the end of 2022 to 'attract and recover international and national talent' that will allow individuals to reside and work in Spain for five years who would only be subjected to non-resident income tax (reduced rate).[34] In Asia, Indonesia – world-known as a digital nomad's hub – has also exposed its plans to provide a digital nomad visa. The terms of the Indonesian digital nomad visa will be five years and its holders will be exempt from taxes on income earned outside of Indonesia.[35]

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[27] Republic of Estonia, *Estonia Is Launching a New Digital Nomad Visa for Remote Workers*, https://e-resident.gov.ee/nomadvisa/ (accessed 7 Apr. 2022).

[28] https://www.e-resident.gov.ee/blog/posts/the-complete-guide-to-being-a-digital-nomad-key-things-to-know (accessed 7 Apr. 2022).

[29] Republic of Croatia, *Ministry of Interior. Temporary Stay of Digital Nomads*, https://mup.gov.hr/aliens-281621/stay-and-work/temporary-stay-of-digital-nomads/286833 (accessed 7 Apr. 2022).

[30] For more details on the Croatian regime, *see* Stjepan Gadzo, *Croatia: A New (Tax Free) Promised Land for Digital Nomads? (Part I),* Kluwer International Tax Blog (2022), http://kluwertaxblog.com/2022/02/24/croatia-a-new-tax-free-promised-land-for-digital-nomads-part-i/ (accessed 7 Apr. 2022); Stjepan Gadzo, *Croatia: A New (Tax Free) Promised Land for Digital Nomads? (Part II),* Kluwer International Tax Blog (2022), http://kluwertaxblog.com/2022/02/28/croatia-a-new-tax-free-promised-land-for-digital-nomads-part-ii/ (accessed 7 Apr. 2022).

[31] Greece, Law no. 4,738/2020, Art. 11, https://www.workfromcrete.gr/wp-content/uploads/2021/09/WorkfromCrete_Greek-National-DN-Visa-Law-4825.2021-Article-11-not-official-translation.pdf (accessed 7 Apr. 2022).

[32] Seychelles, *Experience Seychelles Workcation Retreat*, https://workcation.seychelles.travel/ (accessed 28 Jul. 2022).

[33] *See* Costa Rica, *Trabajadores y. Prestadores Remotos de Servicios de Carácter Internacional – Nómadas Digitales*, https://www.migracion.go.cr/Paginas/Categor%c3%ada%20Migratorias%20%28Extranjer%c3%ada%29/N%c3%b3madas-Digitales.aspx (accessed 28 Jul. 2022).

[34] Spain, *El Gobierno aprueba el proyecto de Ley de Startups que sitúa a España a la vanguardia en atracción de inversión, talento y emprendimiento*, https://portal.mineco.gob.es/es-es/comunicacion/Paginas/211210_agenda.aspx (accessed 6 Oct. 2022).

[35] https://www.bloomberg.com/news/articles/2022-06-06/indonesia-plans-to-lure-digital-nomads-to-bali-with-5-year-visa (accessed 6 Oct. 2022).

In the Brazilian framework, the National Immigration Council is an agency linked to the Ministry of Justice and Public Security that has regulated the 'granting of a temporary visa and residence permit for immigrant without employment relationship in Brazil, whose professional activity can be carried out remotely, called "digital nomad"'.[36] The maximum term of this temporary visa is one year and is renewable for an equal period.

Resolution number 45 was issued by the Immigration Council on 9 September 2021 and provides a definition of digital nomad. According to such norm, a 'digital nomad' is 'the immigrant who, remotely and with the use of information and communication technologies, is able to carry out his work activities in Brazil to a foreign employer'. In its Article 1, paragraph 2, the resolution also clarifies that immigrants who carry out 'work activities, with or without an employment relationship, for an employer in Brazil' are not considered digital nomads.

The individual is responsible to prove his status as a *'digital nomad'* and can do so with the presentation of some documents. These include a declaration of ability to perform his professional activities remotely and an employment or service contract or other documents that prove the link with a foreign employer. Moreover, the individual must prove the existence of a means of subsistence from a foreign source in a monthly amount equal to or greater than USD 1,500.00 or an availability of bank funds in the minimum amount of USD 18,000.00. Unlike the Croatian system, the resolution states nothing about income tax exemption in Brazil.

Hence, if the digital nomad opts for this regime (temporary visa) and completes 184 days, consecutive or not, of permanence in Brazil within a period of up to twelve months, he acquires a residence status in Brazil. This is valid unless he has obtained a permanent visa or employment relationship before completing 184 days.[37] As a resident, the former digital nomad is subject to the same rules that are applicable to other residents in Brazil regardless of whether they hold a temporary visa pursuant to Articles 6 and 20, II, of Normative Instruction number 208/2002.[38]

It is also worth mentioning the recent Provisional Measure number 1,108 issued by the Brazilian President on 25 March 2022. This measure introduced several changes of a labour nature, among them the possibility of adopting the hybrid work by companies with a prevalence of physical work over remote work or vice versa. Additionally, it clarified that the presence of the worker in the work environment for specific tasks, even if in a habitual way, does not de-characterize remote work. Although this normative act does not expressly address digital nomads, it allows an individual who is hired by a Brazilian company to work remotely from another country.

The regimes described above have some common features. They formally target digital nomads; offer tax benefits (the only exception is the Brazilian system); aim at avoiding the use of tourist visas; and allow a longer permanence. Initially, it might be argued that these regimes were created specifically to deal with the tax challenges imposed by the *'digital nomadism'*, legalizing this group and offering more legal certainty (*'apparent reason'*).

However, a more comprehensive examination shows that they are primarily targeting remote workers who wish to experience a certain degree of permanence (*'ultimate reason'*). Many states are aiming to attract people to their territories by granting temporary visas and offering tax benefits. This policy would enhance the local economy; increase revenues derived from consumption taxes; bring expertise/talents; and develop the domestic real estate market.

Moreover, the workers attracted by this regime can bring their families who are also entitled to a temporary visa, meaning that children might go to school; wives and husbands might find a local job; and the states might collect new (tax and non-tax) revenues. After a certain period, these workers would normally become tax residents according to the domestic law which means that other taxes might be levied (capital gains, dividends, etc.) as long as they are not related to the *'digital nomad activity'* subject to a tax exemption. The ultimate goal is for these workers and their families to remain longer in the country thereby establishing new roots and bringing expertise and revenues to the host country.

Although these special schemes impose certain conditions related to the digital nomads' reality, they lack one indispensable element of the very definition of *'digital nomads'*, i.e., short degree of permanence. For instance, the Greek and Spanish regimes grant special visas and tax benefits up to seven and five years, respectively. Digital nomads are not willing to stay in the same jurisdiction for more than three months despite possible tax benefits. They have their own lifestyle that ultimately creates tax opportunities that are more interesting. Otherwise, they are no longer considered digital nomads but digital workers (normal remote workers). Lastly, these regimes would aim at turning digital nomads into digital workers.

This conclusion does not mean that digital nomads cannot use these schemes. They can receive a temporary visa in Croatia and Seychelles, for instance, and reside for

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[36] Brazil, Resolution CNIG/MJSP no. 45, 9 Sep. 2021, https://www.in.gov.br/web/dou/-/resolucao-cnig-mjsp-n-45-de-9-de-setembro-de-2021-375554693 (accessed 7 Apr. 2022).

[37] *See* Brazil, Tax Ruling COSIT no. 180, 19 Oct. 2021, http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?visao=anotado&idAto=121403 (accessed 7 Apr. 2022).

[38] *See* Brazil, Normative Instruction no. 208, 27 Sep. 2002, http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?idAto=15079 (accessed 7 Apr. 2022).

two months and then move to a different jurisdiction. Such behaviour is the core of the digital nomads' definition presented in the previous section. Nonetheless, the present study understands that the very essence of the regimes under discussion is not connected with digital nomads. It regards remote workers who seek more legal certainty, better tax conditions, and a certain degree of permanence. The regimes analysed in this section treat the groups of digital nomads and remote workers as synonyms.

In this regard, one thing must be clarified, i.e., a digital nomad is always a remote worker, but a remote worker is not always a digital nomad. The lack of interest in staying longer in the same jurisdiction composes the very definition of digital nomads and distinguishes this group from others. That is why they create many tax challenges and justify debates within academia and tax administrations worldwide.

Therefore, on one hand, the regimes enacted by different countries focus on attracting remote workers by offering great tax benefits and potentially convincing them to remain longer. On the other hand, they create tax competition among countries that want to attract individuals and businesses through special regimes and tax benefits. It is what is known as the *'race to the bottom'* that was shifted to personal income taxation, received a significant boost with the COVID-19 pandemic, and caught the attention of different organizations.[39]

The European Parliament has recognized that these regimes and their tax benefits enhance tax competition among Member States that is detrimental to the internal market.[40] As an example, the European Commission has launched infringement procedures against Cyprus and Malta regarding their investor citizenship scheme since it 'undermines the essence of EU citizenship'.[41]

The European Commission has also examined some alternatives.[42] One of them refers to the expansion of the code of conduct's scope. This document seeks to ensure coordinated action at the European level to attempt to effectively address harmful tax competition, but it is currently limited to business taxation. According to the proposal, the code of conduct would also include other types of harmful tax practices and especially those targeted at individuals which could directly affect what is known as the EU black and grey lists.

The OECD is focusing its efforts on finding a solution for the corporate taxation of the digital economy, and it has already analysed some residence schemes. According to the OECD, these regimes could be potentially misused to hide offshore assets by circumventing the common reporting standard (CRS) and mask an individual's tax residence.[43] However, no further actions have been taken nor have any discussions ensued since the attention is fully directed to the Pillars 1 and 2 deal.

Besides the current tax competition among countries to attract remote workers, many challenges remain regarding the taxation of the income obtained by these individuals either in the form of employment or from the provision of services.

4 'DIGITAL NOMADS': WHAT COULD BE DONE TO TAX THEIR INCOME?

In addition to the problems related to the tax residence of digital nomads, other challenges are posed on the taxation of the income obtained by these individuals, especially regarding its nature (employment or provision of independent services) and the place of exercising these activities. For this reason, the present article questions not only residence as a proxy for the allocation of tax jurisdiction but also the understanding of how and where the activity (employment or provision of services) is carried out that is currently linked to the need for a physical presence.

4.1 *Income Obtained by Digital Nomads: Articles 14 UN-MC and 15 OECD-MC*

Article 15 OECD-MC brings three rules for the allocation of taxing rights in relation to employment income. The general rule provides exclusive taxation in the employee's residence state which causes numerous difficulties in the case of digital nomads. If the work is performed in the other contracting state, that other state also has the right to tax (cumulative allocation). This again demonstrates the link with the physical presence of the employee at the *'workplace'* (geographical scope).

The third rule, in its turn, provides exclusive taxation in the employee's residence state even if the activity is carried out in the other contracting state. However, three

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[39] *See* Rita de la Feria, *The Perceived (Un)Fairness of the Global Minimum Corporate Tax Rate* (31 Aug. 2022), in *The Pillar 2 Global Minimum Tax* (W. Haslehner et al. eds, Edward Elger 2022) forthcoming, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4205720 (accessed 6 Oct. 2022).

[40] European Parliament, *Avenues for EU Action on Citizenship and Residence by Investment Schemes – European Added Value Assessment* (European Parliamentary Research Service 2021), https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694217/EPRS_STU(2021)694217_EN.pdf (accessed 28 Jul. 2022).

[41] European Commission, *Investor Citizenship Schemes: European Commission Opens Infringements Against Cyprus and Malta for 'Selling' EU Citizenship* (20 Oct. 2020), https://ec.europa.eu/commission/presscorner/detail/hu/ip_20_1925 (accessed 28 Jul. 2022).

[42] European Commission, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Investor Citizenship and Residence Schemes in the European Union*, COM(2019) 12 final, at 18 (European Commission 2019), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0012&from=EN (accessed 29 Jul. 2022).

[43] OECD, *Residence/Citizenship by Investment Schemes*, https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/residence-citizenship-by-investment/#:~:text=%22Citizenship%20by%20Investment%22%20(CBI,or%20against%20a%20flat%20fee (accessed 29 Jul. 2022).

negative and cumulative conditions must be fulfilled. First, the employee must be present in the other state (*'workplace'*) for a period or periods that do not exceed a total of 183 days in a twelve-month period commencing or ending in the relevant fiscal year. Second, the remuneration must be paid by or on behalf of an employer who is not a resident of the other state. Finally, the remuneration must not be borne by a PE that the employer has in the other state.

In this sense, the second and third rules contained in Article 15 OECD-MC are directly linked to a physical presence of the employee in the state where the activities are being carried out, thus the employer's residence is not relevant (what matters is who is the employer[44]). In any case, it is not just any physical presence that allows taxation by the source state insofar as short-term activities must be taxed exclusively in the residence state (183-day rule) which is precisely the case with digital nomads. This link with a physical presence is clear in the OECD Commentaries to Article 15 that state that the place where work is carried out means the state where the employee is 'physically present when performing the activities for which the employment income is paid'.[45]

Early in the COVID-19 pandemic, the OECD understood that, when a government subsidizes the maintenance of an employee on a company's payroll, the income received by the employee must be attributed to the place where the employment was usually exercised on the basis of Article 15. In the case of employees who work in one state but move from another state where they reside (cross-border workers), the conclusion is the same. However, it requires an 'exceptional level of coordination between countries to mitigate the compliance and administrative costs for employees and employers associated with involuntary and temporary change of the place where employment is performed'.[46] For this reason, some jurisdictions have issued different guidance and administrative measures to mitigate any additional burden.[47]

In a second opportunity,[48] the OECD analysed three different situations. The first case involves the granting of a wage subsidy and similar income received by cross-border workers who cannot carry out their work due to restrictions (taxation must occur in the place where the employee used to carry out his work). The second situation refers to a worker who is forced to remain in a jurisdiction where he is not a resident but previously held a job. In this case, the OECD states that it would be reasonable that the additional days spent in that jurisdiction under exceptional circumstances be disregarded for the purposes of the 183-day test. Thus, it maintains its neutral position as observed in relation to tax residence. That is, nothing has changed with the pandemic.

The last scenario concerns an individual who works remotely from one jurisdiction for an employer who is resident in another jurisdiction. In this case, it was concluded that changes in the jurisdiction where an employee works might affect where his employment income is taxed. As such, it is possible that new taxing rights emerge in relation to the employee's income in other jurisdictions which can produce compliance costs for both the employer and the employee since payroll taxes are often withheld at source.

An interesting case refers to frontier workers. The income from employment obtained by these individuals receives special treatment that is different from that provided for in Article 15 OECD-MC. Several countries, mainly Europeans, have included special clauses in their double tax treaties with neighbouring jurisdictions in order to regulate the situation in which residents frequently travel to work in another country. For example, this treatment may provide that these individuals are taxed on their employment income only in the home jurisdiction provided that any work activity carried out elsewhere is limited to a maximum period (generally, it varies from four to six weeks of work).

For this reason, some countries have entered into bilateral agreements in order to treat the COVID-19 pandemic as a *force majeure* or an exceptional circumstance. These countries extended such agreements until the end of the first semester of 2022.[49] Accordingly, the time spent by the employee teleworking in his home jurisdiction will not be included in the calculation of the maximum working days outside the working jurisdiction for the purposes of the treaty.

There are no longer *'involuntary changes'* or *'force majeure'*. The situations above gained momentum in the post-pandemic world and became the *'new normal'*, especially with

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[44] *See* Leonardo T. Pignatari, *Article 15(2) of the OECD Model and the International Hiring-Out of Labour: New Criteria Required?*, 74 Bull. Int'l Tax'n 8 (2020), Journal Articles & Opinion Pieces IBFD (accessed 27 Jul. 2022), ss. 2.2 and 2.3.3.

[45] OECD, *Model Tax Convention on Income and on Capital 2017: Commentaries to Article 15* (Paris: OECD Publishing 2017), para. 1, https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2017-full-version_g2g972ee-en (accessed 7 Apr. 2022).

[46] OECD (2020), *supra* n. 17, at 5.

[47] The United Kingdom understands that there is no change to Art. 15, and its application will depend on the employee's circumstances. In any case, the UK Government has accepted that a non-resident is not liable for income from employment there during a period of an unexpected forced stay due to COVID-19 (*see* United Kingdom, https://www.gov.uk/tax-uk-income-live-abroad (accessed 08 Apr. 2022)).

[48] OECD (2021), *supra* n. 17, at 15–21.

[49] For instance, agreements signed by Luxembourg with Belgium, France, and Germany (*see* Deloitte, *Luxembourg Tax Alert: Germany, France and Belgium COVID-19 Crossborder Personal Tax Measures: Further 2022 Extensions Confirmed*, https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/tax/taxalerts/lu_tax-alert_germany-france-belgium_covid19-cross-border-personal-tax-measures.pdf (accessed 8 Apr. 2022)).

the significant increase of *'digital nomadism'*. This group's lifestyle poses new challenges and makes it difficult to identify the *'workplace'*. They are not physically present in their employer's residence state nor do they perform activities related to businesses in the country where they are working remotely. This situation is reminiscent of the example given previously about the digital nomad.

Imagine that the digital nomad, Laura, is a national of State A and leaves her country to live a new life but maintains her tax residence (domicile registered in State A). However, in love with this free and adventurous lifestyle, she does not intend to return to her home jurisdiction. This change of life was only possible due to her employment relationship with a company resident in State B for which the activities allow remote work requiring only a computer with good Internet access. In fact, she has never been to State B and has never met her bosses in person. All work performed by Laura involves her employer's businesses in State B. She decides to work remotely from different jurisdictions (States C, D, E) keeping the same three rules, i.e., not spend more than ninety days in the same country, use tourist visas, and never work in the same jurisdiction as her employer (State B).

Pursuant to Article 15 OECD-MC, the states in which the work was performed (C, D, and E) – meaning where she was physically present – cannot tax due to Laura's short physical presence therein. The same situation applies to the employer's residence state (B) that is precluded from taxing by the tax treaty. In this scenario, State A would have an exclusive right to tax the employment income received by Laura (residence). Such an outcome creates the opportunity of placing her residence in countries with favoured regimes or taxation on a territorial basis. This is the same problem identified for legal entities but, in a certain manner, neglected for individuals.

For instance, imagine that Laura decides to keep her digital nomad lifestyle but fixes her residence in State F considering that this jurisdiction determines residence based on mere registration and adopts a taxation regime on a territorial basis. The result is that she might not be taxed anywhere in the world once she does not obtain income within the territory of State F but only the salary paid by an employer in State B that might be precluded from taxing. Consequently, there is a profit (income) shift to countries with low or no taxation as has been massively discussed at the level of legal entities.[50]

Furthermore, it is not easy to discern the nature of the activities carried out by digital nomads (employment or provision of services). As highlighted in another study, the concepts of *'employee'* and *'independent service provider'* are becoming increasingly indistinguishable so that this dichotomy has lost its importance due to the emergence of new business models and new modalities of work within the digital economy world.[51] The very concept of work is moving away from the need for a physical presence either on the employer's premises or in the employer's own jurisdiction. In this context, the question is whether it is appropriate to give different tax treatments to these two categories that, day after day, come closer, and their differences become less distinct.[52]

If Laura was an independent service provider (for example, a freelancer), which seems to be most of the cases for digital nomads, the problem remains the same when examined in the light of other provisions. Article 7 OECD-MC provides for exclusive taxation in the residence state (State A) unless there is a PE in the other state (C, D, and E) which is quite doubtful given the temporary nature of *'digital nomadism'* and the nature of the services provided. Typically, the services are provided to companies or individuals residing in a third state other than the one in which the digital nomad is working remotely.

Similarly, Article 14 UN Model Convention (UN-MC) requires the characterization of a fixed base or the employee's presence for a period exceeding 183 days so that the source state can tax the income derived from the provision of 'professional services or other activities of an independent character'.[53] This structure faces the same problem. Digital nomads do not remain for long periods in the same jurisdiction. Besides that, it is not clear which jurisdiction should be considered the source in this case (state where the digital nomad works remotely, the state in which the service recipients are located, or even where the employer is located).[54] The *'workplace'* as historically known no longer exists.

It is worth mentioning that such a tax challenge has recently reached the US Supreme Court in the still pending case of *New Hampshire v. Massachusetts.*[55] Due to the tax difficulties imposed by remote workers, Massachusetts changed its income sourcing rules so that income of

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[50] For example, Kostíć proposes a *'qualified residence'* for these individuals in order to access treaty benefits like that provided in the *'limitation of benefits'* (LOB) clause for legal entities (Kostíć, *supra* n. 10, at 202–203).

[51] *See* Pignatari, *supra* n. 44, s. 2.4.2.

[52] *See* Beretta, *supra* n. 6, ss. 4.2 and 6.2.

[53] *See* UN Model Double Taxation Convention Between Developed and Developing Countries: Art. 14, Treaties & Models IBFD; Fernando De Man, A tributação de serviços na fonte e as convenções modelo: renascimento dos ideais do artigo 14 OECD. In Revista de Direito Tributário Atual No. 27, at 39 (São Paulo: Dialética/IBDT 2012).

[54] *See* Alessandro Turina, *Which 'Source Taxation' for the Digital Economy?*, 46(6) Intertax 495–519 (2018), https://kluwerlawonline.com/journalarticle/Intertax/46.6/TAXI2018053 (accessed 7 Oct. 2022).

[55] *See* Hayes Holderness, *Individual Home-Work Assignments for State Taxes* (14 Jan. 2022). Washington Law Review, Forthcoming, https://ssrn.com/abstract=4009277 (accessed 7 Oct. 2022).

remote workers is taxed in the location of the employer where the workers had physically worked before the pandemic. The previous rules considered the place where the employee was physically present. Under these new rules, those who had physically commuted from other states into Massachusetts to work would continue to have their income sourced to Massachusetts when they worked remotely for their Massachusetts-based employers. Considering that many New Hampshirites used to travel into Massachusetts to work and are now working remotely, New Hampshire sued Massachusetts claiming that the latter's actions were unconstitutional.

The present study does not intend to delve into the particularities of that lawsuit that are connected with the US state tax system and its constitution but instead to show that the tax challenges referred to herein are not limited to academic works. This real-life case accentuates the importance of discussing the tax difficulties derived from the *'new normal'*.

4.2 *Possible Alternatives to Tax the Income Obtained by Digital Nomads*

The difficulties presented in this contribution require the redesign of the current system in order to detach it from the need for a physical presence both for the determination of tax residence and for the attribution of taxing rights to the source state.

4.2.1 *Residence Rules*

An initial alternative consists in the reassessment of the domestic residence rules and the tiebreaker rules provided in double tax treaties in order to detach them from the classic territorial connection. In this regard, the Estonian e-residence model represents an interesting commencement. This is particularly relevant when residence rules (for instance, place of registration) might serve for the purposes of shifting the tax burden to low or no tax jurisdictions.

Additionally, the CRS rules might be useful as a complementary mechanism. Under the CRS, financial institutions must ensure that account holders (or controlling persons) disclose all tax residences and their taxpayer identification number (TIN) in the required self-certification form applying what is known as the *'reasonableness test'*. In this sense, financial institutions are required to *(1)* identify customers who appear to be tax resident outside of the jurisdiction where they hold their accounts and products, and *(2)* report certain information to the local tax authority. The local authority may share such information with the tax authority where the person is considered a resident.[56]

Normally, reportable accounts include those held by foreign tax residents in a country that participates in the CRS, and individuals who do not comply are reported based on indicators of a foreign tax residence. Accounts held by domestic tax residents or foreign tax residents in a country that does not participate in the CRS are not reportable. Given that the digital nomad probably has a bank account, the financial institution must verify his information provided in the self-certification procedure. That is, the digital nomad needs to provide a tax residence and a TIN that will assessed by the bank and potentially shared with the local tax authority.

Although the CRS has been signed by more than 100 jurisdictions,[57] the level of compliance and how financial institutions would be able to ascertain the identification of digital nomads among millions of accounts is still uncertain. For instance, Indonesia, known as a major digital nomad hub, has joined the CRS. In any case, the multilateral approach taken by the CRS might be an important tool to determine not only a digital nomad's residence but also how much and from where income was received.

4.2.2 *Digital Nomads' Income Allocation*

In order to rethink Article 15 OECD-MC, it is important to present five main scenarios that consider *(1)* residence of employee; *(2)* residence of employer; and *(3)* workplace. The same examples also apply to Article 14 UN-MC in a certain manner.

The first is the classic example of an employee who is resident in the state where the employer is located and works in that jurisdiction (State A). In this case, there might be exclusive taxation in the residence state (first part of Article 15, paragraph 1). However, in a second situation, this same individual can work in a different jurisdiction (State B) for a certain period of time and for a specific project for which the second part of Article 15(1) will apply unless the conditions set forth in Article 15(2) are fulfilled.

A third scenario would be an employee who is a resident of State A and exercises his employment in the same state where his employer resides (State B). In this situation, the state in which the employment is exercised may tax since the negative condition of Article 15(2) b is not met. Such a scenario might also involve what is referred to as the *'international hiring out of labour'* for which there is a discussion between a formal and an economic employer.[58]

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[56] OECD, *Automatic Exchange Portal: Online Support for the Implementation of Automatic Exchange of Information in Tax Matters. Rules Governing Tax Residence*, https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-residency/ (accessed 6 Oct. 2022).

[57] OECD, *The CRS Multilateral Competent Authority Agreement,* https://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/ (accessed 6 Oct. 2022).

[58] Pignatari, *supra* n. 44.

A fourth scenario involves the case of a remote worker. Imagine an employee resident in State A where he works remotely for a company located in State B and consider that this individual only works remotely from State A. There is no *'involuntary change'* nor *'force majeure'* in this post-pandemic situation. In this example, State A would be entitled to tax the employment income, but State B would be precluded from taxing it.

A final situation refers to the digital nomad lifestyle that is the subject of the present study. As previously described, digital nomads are individuals who are nationals of a particular state (A) who work remotely from different countries (C, D, E) while staying a very brief period of time in each of them. They usually have an employment relationship with an employer situated in another jurisdiction (B) or provide services independently for companies or individuals resident in other states. For this reason, digital nomads pose different challenges from the previous examples due to their brief degree of permanence. To remember, every digital nomad is a remote worker, but not every remote worker is a digital nomad. This statement might produce different tax consequences.

In this complex and challenging context, Hayes Holderness adopts a controversial position. He defends the location of the employer instead of the place of work (where the employee is physically located) as a proxy for taxing income obtained by remote workers.[59] According to Holderness, sourcing income to the employer's location would not encourage remote workers to relocate to low-tax jurisdictions and thereby lead to inequitable treatment of workers earning the same income. Despite his particular understanding, Holderness reluctantly presents the formulary apportionment of remote income as a 'potential middle ground in a world of remote work'.[60] Pursuant to this regime, remote workers' income would be divided among the state where the remote worker is physically located and that where the employer is located.

Notwithstanding, this position derives from an in-depth analysis of US state taxation, its constitution, and the case law of the supreme court and not from the distributive clauses provided in double tax treaties. In any case, such a policy option does not address digital nomads, disregards the personal characteristics of the taxpayer and therefore violates the ability to pay principle and the classic treaty approach to employment income. The taxpayer is the employee, and not the employer. Besides that, the employee might not have worked in the employer's jurisdiction before, and domestic and treaty anti-abuse provisions might effectively address potential abuses.

When examining the tax treaty provisions, Giorgio Beretta proposes a single article (*'Labour Income'*) on income earned by employees and independent service providers according to which the employee's residence state would have the primary taxing rights.[61] The source state (*'workplace'*), in its turn, could tax such income if the individual is physically present in its territory for a period of at least ninety days in any twelve-month period beginning or ending in the fiscal year concerned. In addition, source taxation would take place if the individual performs his work activities through a PE or fixed base in that jurisdiction. Similarly, the EESC has suggested that Member States should agree 'to only tax the employee if the number of working days in the country exceeds 96 days per calendar year'.[62]

Conversely, the amendments to Articles 14 and 15 or the creation of a single article (*'Labour Income'*) would apply, in principle, to all providers/workers including those of the *'old normal'.* Any modification must be taken carefully not to create asymmetries and inequalities.

Although the idea of a single article is great and the reduction of the 183-day rule is relevant, this proposal alone does not eliminate the difficulties related to both the determination of the residence of digital nomads and the identification of the *'workplace'* in the digital economy context. It only reduces the level of physical presence required for taxation at source and, as the present study has shown, digital nomads typically spend less than ninety days in the same jurisdiction.

The complete elimination of physical presence as a criterion for the allocation of taxing rights to the source state or at least the reduction of the 183-day rule provided in Articles 14 UN-MC and 15 OECD-MC for a more appropriate level to this new reality must accord with other measures. It is also important to remove the dichotomy employment-independent provision of services and give these categories the same tax treatment in light of double tax treaties.

Some authors support the removal of items *b* (employer resident in the *'workplace'*) and *c* (employer's PE in the *'workplace'*) from Article 15(2) OECD-MC.[63] They contend that these provisions rely on an outdated concept of *'employer',* and abusive situations could be tackled by the principal purpose test clause (PPT).

However, the present study indicates that it is better to keep at least item *c* that deals with PEs. Remote work may

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[59] Hayes Holderness, *Individual Home-Work Assignments for State Taxes* (14 Jan. 2022), Washington Law Review, Forthcoming, https://ssrn.com/abstract=4009277 (accessed 7 Oct. 2022).

[60] *See ibid.*, at 58–60.

[61] *See* Beretta, *supra* n. 6, s. 6.3.

[62] European Economic and Social Committee, *supra* n. 23, para. 1.8.

[63] *See* Beretta, *supra* n. 6, s. 6.3; Kostíć, *supra* n. 10, at 223.

create a PE or a fixed base of the employer where the activity is exercised under special circumstances which would justify taxation in the source state. In this context, the new cumulative conditions should be written in a positive form.

Moreover, a multilateral redistribution instrument whereby the residence state (employee) transfers the corresponding portion to the source states can overcome any administrative difficulties such as the withholding tax on salaries. This instrument is similar to the *'*one-stop-shop (OSS)*'* system that is employed in the European Union for VAT purposes.[64] Such a multilateral mechanism would demand coordination, information exchange, and administrative assistance between countries thereby reducing compliance costs for both taxpayers (employers and employees) and tax authorities.

According to this system, the employer would be required to report the number of days cross-border teleworkers worked in their country of residence, in the jurisdiction where the employer is situated, or elsewhere (in the case of digital nomads). In this context, tax authorities would be able to identify which jurisdiction is allowed to exercise its taxing rights as well as apportion and allocate the employment income among different jurisdictions. Although this mechanism appears to be promising, it has additional difficulties regarding digital nomads since the activities carried out in multiple jurisdictions for a very short period of time are primarily qualified as independent personal services. One alternative might be to extend such obligations – initially applicable only to employers – to independent contractors. However, the compliance and enforcement difficulties remain and require a high level of coordination and transparence from the players involved (taxpayers and jurisdictions).

The present study recognizes the difficulties in implementing these measures and the possibility that they are not sufficient to face the *'new normal'* as a whole. In this sense, the introduction of a specific provision for digital nomads in double tax treaties cannot be precluded. It would describe the characteristics of a digital nomad and adhere to the same rationale as the one historically applied to frontier workers and the one contained in Article 15(3) OECD-MC for workers on ships or aircrafts. If an abusive situation occurs (like the one about the digital nomad, Laura), the principal purpose test clause will be sufficient to deny the treaty benefits (exclusive residence taxation). A *'qualified residence test'* for digital nomads such as that provided in the limitation of benefits (LOB) clause would also supplement this anti-abuse package.[65]

In short, this paper presents the following alternatives:

1. The unification of Articles 14 UN-MC (independent personal services) and 15 OECD-MC (employment income), removing the distinction between these two categories and the use of the term *'employer'*. This new provision would have a structure similar to that of Article 15 and use the term *'contractor'* (it would receive a treaty definition), meaning that:
   a. Rule – The residence state has the primary taxing rights in respect of employment or the provision of independent personal services.
   b. Exception – If these activities are exercised in the other contracting state, such income as is derived therefrom may be taxed in that other state. This cumulative taxation would only be applicable if at least one of two positive conditions are met: (i) recipients present in that other state for a period or periods exceeding in the aggregate seventy days, and (ii) the remuneration is borne by a PE or fixed base that the contractor has in the other state.
2. Adoption of a multilateral redistributive mechanism similar to the EU OSS.
3. Possible adoption of a special provision in the treaty regarding digital nomads like those applicable to frontier workers and workers aboard a ship or aircraft.

5 Conclusion

Tax residence and the allocation of taxing rights to source states are historically linked to the need for a physical presence – a territorial bond. Despite the minimal attention received from tax administrations, international organizations, and academia, this connection is also challenged in the taxation of individuals. Work mobility brings important challenges for both companies and individuals that are especially related to the determination of tax residence and the taxation of the income obtained by them.

The COVID-19 pandemic has boosted the technological development and the search for new lifestyles (personal and professional), breaking the territorial boundaries of neighbouring jurisdictions. Under this new reality, it is not strange to think that Brazil and Indonesia might become *'neighbours'*, and digital nomads may be seen as the cross-border workers of the *'new normal'*.

Individuals and their employers face important and complex questions derived from the current growing work mobility. Challenges go beyond tax law and affect many areas such as labour law and the social security system. For instance, which social security system applies, for which jurisdiction should the employer pay taxes, how does the withholding tax on the salaries operate, and which labour legislation applies?

Notes

[64] *See* Kostić, *supra* n. 10, at 212. *See also* European Economic and Social Committee, *supra* n. 23, para. 1.9; European Commission (2016), *supra* n. 24, at 26.

[65] *See* Kostić, *supra* n. 10, at 202–203.

Different countries enacted special regimes to deal with the *'digital nomadism'* phenomenon. However, they lack one indispensable element of the very definition of *'digital nomads'*, i.e., the brief degree of permanence, and misinterpret the groups of digital nomads and remote workers. The short degree of permanence distinguishes digital nomads from others, and imposes greater challenges.

In this context, the present study sought to analyse the tax difficulties arising from *'digital nomadism'* with exclusive focus on individual taxation. Digital nomads do not remain for long periods in the same jurisdiction and might be considered residents nowhere. For this reason, this article suggests the modification of residence rules both at the level of domestic law and that of double tax treaties (tiebreaker rules). This could relativize the requirement of physical presence or a territorial connection for the acquisition of a resident status. In this regard, the CRS rules might be useful once they require the financial institutions to *(1)* identify customers who appear to be a tax resident outside of the jurisdiction where they hold their accounts and products and *(2)* report certain information to the local tax authority.

The present article proposes some alternatives regarding the taxation of income earned by these individuals. The first is the unification of Articles 14 UN-MC (independent personal services) and 15 OECD-MC (employment income) and the removal of the distinction between these two categories and the use of the term *'employer'*. This first alternative would have a similar structure to that of Article 15. That is, *(1)* exclusive taxation in the employee's residence state (*'general rule'*) and *(2)* cumulative taxation if the activities are exercised in the other contracting state, and one of two positive conditions are met (*'exception'*). It reduces the 183-day rule to seventy days and retains the PE requirement.

The second change refers to a multilateral redistribution instrument through which the residence state transfers the corresponding portion to the source states. Finally, the inclusion of a special provision for digital nomads and other types of work in double tax treaties should not be ruled out. Potential abuses (residence in low tax jurisdictions) can be effectively addressed by the PPT clause and a *'qualified residence test'* for individuals under the LOB provision.

Although each scenario brings particular challenges and there is no universal solution, the present study attempted to elucidate these problems and the need for changes in the international tax system. In this reality, physical presence is increasingly rarer not only for companies but also for individuals. Individuals have already realized it; now, the states must adapt their tax regimes to the *'new normal'* by focusing not only on the impacts of the digital economy on legal entities but also on individual taxation.