RESIDENTIAL STATUS OF INDIVIDUALS

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WHY IS RESIDENCE IMPORTANT?

Who is entitled to claim treaty benefits:

Art. 1 OECD MC:

"This convention shall apply to **persons** who are **residents** of one or both of the Contracting States"

- **Two requirements:**
  - **Person** => Art. 3(1)(a))
  - **Resident** => Art. 4 (the concept of residence)

ARTICLE 4(1)

Who is a resident ? – Art.4(1)

A resident is any person who, under the laws of that State, is **liable to tax** therein by reason of his domicile, residence, place of management **or any other criterion of a similar nature**, and also includes that State and any political subdivision or local authority thereof. **This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.**

ARTICLE 4(1)

Condition for applicability of tax treaties:

worldwide tax liability (not limited tax liability) exists in at least one of the two states. If worldwide tax liability exists in one state, the other contracting state is obliged to apply the tax treaty.

IMPORTANCE OF RESIDENCE

Art. 4 Residence

The definition of residence serves several purposes:

See e.g.

Art. 11 (1):

Interest arising in a Contracting State and paid to a RESIDENT of a Contracting State may be taxed in THAT OTHER STATE.

=> You need to find out which of the two States is the Residence State and which is the Source State

ARTICLE 4(2)

Tie-breaker rules if a person is resident in both States to determine residence for tax treaty purposes

- Individuals
  - Art. 4(2) OECD Model
    - Permanent home
    - Center of vital interests – personal and economic interests
    - Habitual abode
    - Nationality – see definition in Art.3(1)(g), OECD Model

ARTICLE 4(2)

..special rules must be established which give the attachment to one State a preference over the attachment to the other State. As far as possible, the preference criterion must be of such a nature that there can be no question but that the person concerned will satisfy it in one State only, and at the same time it must reflect such an attachment that it is felt to be natural that the right to tax devolves upon that particular State

PERMANENT HOME

The Article gives preference to the Contracting State in which the individual has a permanent home available to him. This criterion will frequently be sufficient to solve the conflict, e.g. where the individual has a permanent home in one Contracting State and has only made a stay of some length in the other Contracting State.

this home must be permanent, that is to say, the individual must have arranged and retained it for his permanent use as opposed to staying at a particular place under such conditions that it is evident that the stay is intended to be of short duration.

CENTRE OF VITAL INTERESTS

If the individual has a permanent home in both Contracting States, it is necessary to look at the facts in order to ascertain with which of the two States his personal and economic relations are closer. Thus, regard will be had to his family and social relations, his occupations, his political, cultural or other activities, his place of business, the place from which he administers his property, etc. The circumstances must be **examined as a whole**, but it is nevertheless obvious that considerations based on the personal acts of the individual **must receive special attention**.

If a person who has a home in one State sets up a second in the other State while retaining the first, the fact that he retains the first in the environment where he has always lived, where he has worked, and where he has his family and possessions, can, together with other elements, go to demonstrate that he has retained his centre of vital interests in the first State

HABITUAL ABODE

When does the test of habitual abode come into play?

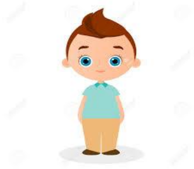
The phrase “séjourne de façon habituelle”, which is used in the French version of subparagraph b), provides a useful insight as to the meaning of “habitual abode”, a notion that refers to the frequency, duration and regularity of stays that are part of the settled routine of an individual’s life and are therefore more than transient. As recognised in subparagraph c), it is possible for an individual to have an habitual abode in the two States, which would be the case if the individual was customarily or usually present in each State during the relevant period, regardless of the fact that he spent more days in one State than in the other.

WHAT NEXT?

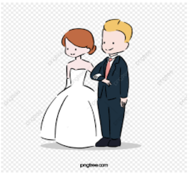
Where, in the two situations referred to in subparagraph b) the individual has an habitual abode in both Contracting States or in neither, preference is given to the State of which he is a national.

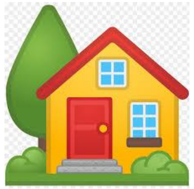
If, in these cases still, the individual is a national of both Contracting States or of neither of them, subparagraph d) assigns to the competent authorities the duty of resolving the difficulty by mutual agreement according to the procedure established in Article 25

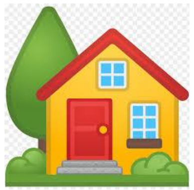
HOW WOULD YOU SOLVE THIS?



Is Karol resident in Germany or in Canada for the purposes of the tax treaty between Germany-Canada?







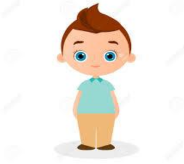
income

income

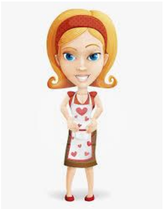
Germany

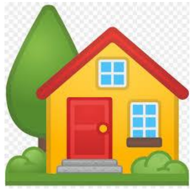
Canada

HOW WOULD YOU SOLVE THIS?



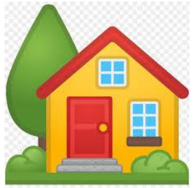
How do you determine where Ivan is resident for the purposes of the tax treaty between France and Malta?





France

1-2 months



Malta

Rest of the year