

SCOPE OF INTERNATIONAL TREATIES TO AVOID DOUBLE TAXATION

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Abstract: *Purpose:* The conventions concluded by the Republic of Moldova on the notion of "person" do not include the element of society, replacing it with the notion of a legal entity. *Data:* However, the conventions concluded by the Republic of Moldova in the article that will refer to the general definitions (art. 3), will not even refer to the content of a legal person, as is done in the case of the Model Convention, when it refers to the notion of "society". *Methodology:* These distinctions do not have deviant interpretations, because the notion of "company" is defined by the Model Convention in the following way: "the term "company" designates any legal person or any entity that is considered for taxation purposes as a legal person". *Findings:* Therefore, in the broad sense of the concept of "legal person", used in the conventions concluded by the Republic of Moldova, only those legal persons that are taken into account "for the purpose of taxation" can be defined, i.e. legal persons that are subject to taxation with regard to taxes which are covered by the convention. In the case of legal entities, when it is a resident of both contracting states, it is considered resident in that contracting state where the effective management body is located. It is necessary to underline the fact that the international benefits of elimination of double taxation are offered only to subjects resident in one or both signatory states. A taxable subject who is not resident in one of these states will not be able to benefit from the provisions of the conventions.

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The scope of international double taxation treaties covers three different aspects: the taxes covered, the geographical area in which it has effect and the persons it covers. I propose to examine each of these areas in turn.

A) Taxes covered by the Treaties. In principle, the Convention applies to taxes on income and wealth levied in the Contracting States in accordance with the legal provisions. For example, the Agreement between the Government of the Republic of Moldova and the Government of the Russian Federation on the Avoidance of Double Taxation of Income and Property and the Prevention of Fiscal Evasion, in art. 2 para. 1 states that "This Agreement shall apply to taxes on income and property levied on behalf of the Contracting State, irrespective of the manner in which they are levied."

In some cases, although the Convention does not contain the above text, it does not exclude taxes levied at lower levels, as is clear from the list of taxes it covers, e.g. the case of the Romanian-German Convention, which in Art. 2, para. 3, lists the Romanian income and wealth taxes levied on both the state budgets and the budgets of the administrative-territorial units, respectively the German taxes that feed both the federal budget and the state and local budgets [1]."

The OECD Model Convention stipulates the following definition: "Taxes on income and wealth shall be deemed to be taxes on total income, total wealth or parts of income or wealth, including taxes on income from the alienation of movable or immovable property, and taxes on the increase in value [2]."

As we note, social security contributions or other social charges are not considered to be taxes on the total amount of wages and salaries, and are therefore not subject to the double taxation convention. The State does not levy contributions in its capacity as a public authority, but as an insurer, i.e. as a national organiser of social benefits. Therefore, only the State which provides social security protection to persons working in its territory has the right to levy contributions.

The next paragraph provides for the continued application of the Convention irrespective of subsequent changes in the system of taxes and duties of the signatory States. "The Agreement shall also apply to any identical or substantially similar taxes imposed by either Contracting State after the date of signature of this Agreement in addition to or in place of the existing taxes referred to in paragraph 3 of this Agreement. The competent authorities of the Contracting States shall inform each other of any significant changes in their tax legislation [3]." So in this case only one condition is laid down, namely that the taxes and charges introduced subsequently must be of the same or similar nature to those in force at the date of signature of the Convention. This provision is important because it prevents possible changes to the tax system in the two States.

B) Geographical area. The geographical area or territory subject to the provisions of a tax convention is usually that over which each contracting State exercises sovereignty. According to Article 3 of the Constitution [4] of the Republic of Moldova: "The territory of the Republic of Moldova is inalienable. The borders of the country are constituted by organic law, respecting the unanimously recognized principles and norms of international law."

According to Article 2 of the Law on the State Border of the Republic of Moldova [5] "The State border of the Republic of Moldova shall be established by the Parliament, respecting the principles and norms of international law and may be changed only by law." And Article 3 (1) states "The state border is established in treaties concluded by the Republic of Moldova with neighbouring states on the basis of the totals of the work of bilateral delimitation and demarcation commissions, and is marked on the ground with clearly visible border signs. The treaty on the demarcation and marking of the state border on the ground is to be ratified by the Parliament."

In international practice there are not a few situations where tax treaties concluded by certain States will not apply to territories dependent on these States, as these territories have fiscal autonomy [6].

C) Persons concerned. Tax treaties state that they "apply to persons who are residents of one or both of the Contracting States [7]." "This Convention applies to persons who are residents of one or both of the Contracting States [8]."

Resident. Unlike earlier drafts which were applicable to nationals of signatory states, the Model Treaty uses a broader term - resident. "This new orientation does not distinguish between taxable persons of different nationalities, it was considered appropriate in order to meet the requirements corresponding to the current stage of development of international financial relations [9]." The OECD Model Convention states [10]:

"1. For the purposes of this Convention, the term 'resident of a Contracting State' means any person who, under the laws of that State, is considered to be liable to tax therein according to his domicile, residence, place of management or any other criterion of a similar nature, and shall apply equally to that State and to all its political subdivisions or local authorities. However, this term does not include persons who are not considered as taxable persons in that State except in respect of income arising in that State or wealth arising in that State.

2. If, under the provisions of paragraph 1, an individual is a resident of both Contracting States, his situation shall be regulated as follows:

(a) such person shall be deemed to be a resident only of the State in which he has his permanent residence; if he has his permanent residence in State, he shall be deemed to be a resident only of the State with which he has links;

(b) if he is resident in the State with which he has the closest personal and economic ties (centre of vital interests);

c) if the State where that person has the centre of his vital interests does not can be determined, or if the person does not have a permanent home in any State, he shall be deemed to be resident only in the State where he is habitually resident regularly;

(d) if that person regularly resides in both States or if he does not regularly resides in either State, he shall be deemed to be a resident only of State whose nationality he possesses;

(e) if that person possesses the nationality of both States or if he is not if he or she is a national of both States, or if he or she is not a national of either State, the competent authorities of the States if the person concerned is of both States and is of both States, the competent authorities of the Contracting States shall settle the matter by mutual agreement.

3. If, in accordance with the provisions of paragraph 1, a person other than natural person is a resident of both Contracting States, he shall be deemed to be resident only in the State in which his place of effective management is situated".

Understanding and deciphering the meaning of "residence" is important in determining the scope of application of the conventions in resolving cases where double taxation arises as a result of double residence and, finally, in resolving cases where double taxation arises from the rules applied in the State of residence as opposed to those applied in the source State.

So, the authors of the treaties have to resolve two issues respectively:

- which person is considered a resident of one of the signatory states;
- how to deal with cases of dual residence.

Article 5(5) and (6) of the Tax Code of the Republic of Moldova defines both the concept of resident[11] and non-resident. It is considered resident:

(a) any natural person who meets one of the following requirements:

- has a permanent residence in the Republic of Moldova, including:
- he/she is in treatment or rest, or education, or travelling abroad;
- is a person holding a position of responsibility of the Republic of Moldova, working abroad;
- is in the Republic of Moldova for at least 183 days during the tax year;

b) any legal person or individual enterprise, or peasant (farmer) household, whose entrepreneurial activity is organized or managed in the Republic of Moldova or whose place of business is the Republic of Moldova.

Thus, for the purposes of the Agreement between the Republic of Moldova and the Republic of Hungary on the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on property of 1 January 1997, the term "permanent establishment" means the permanent place of business through which the enterprise of a Contracting State carries on its entrepreneurial activity in the other Contracting State. Article 5(5)(b) of the Tax Code provides a similar definition.

- The expression "permanent establishment" means a fixed place of business through which the enterprise carries on all or part of its activities [12].

- The expression permanent establishment includes:

- a place of management; a branch; an office;
- plant; a workshop;
- facilities for prospecting for revenue;
- a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;
- a warehouse or the like used for the supply of goods for the purpose of earning income;
- a construction site, a construction project, installation erection of plant or supervisory activities in connection therewith, but only when such site, project or activities last for a period of more than 12 months;
- the provision of services, including consultancy services, by an enterprise of a Contracting State, provided that such activity lasts, for the same or a related project, for a period or periods totalling more than 12 months.

The mere fact that an enterprise carries on business in another State through a broker, general commission agent or any other agent of independent status; the fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other State

(through a permanent establishment or otherwise) is not sufficient to make such companies a permanent establishment of the other [13].

Cases may often arise where the individual is a resident of several States (the case of conflicts of residence), in which case the solutions proposed by the conventions concluded in this area are as follows [14]:

(a) he will be deemed to be a resident of the Contracting State in which he has his permanent residence; if he has permanent residence in both Contracting States, he will be deemed to be a resident of the Contracting State with which his personal and economic ties are closer (centre of vital interests);

(b) if the Contracting State in which that person has the centre of his vital interests cannot be determined, or if he has no permanent residence in either Contracting State, he shall be deemed to be a resident of the Contracting State in which he is actually resident;

(c) if that person actually resides in both Contracting States or in neither of them, he shall be deemed to be a resident of the Contracting State of which he is a national;

d) if each Contracting State considers that person to be a national of itself or of neither of the States, then the competent authorities of the Contracting States shall settle the matter by mutual agreement.

A special situation may arise where the States signatory to the convention provide in their domestic legislation for the possibility of dual citizenship, in which case the tax conventions will include provisions on how to determine the status of the person in order to correctly apportion the right to tax [15].

In the case of a legal person, where it is a resident of both Contracting States, it shall be deemed to be a resident of the Contracting State in which its effective centre of management is situated.

Finally, it should be emphasised that the international benefits of the elimination of double taxation are available only to persons resident in one or both Contracting States. A taxable person who is not resident in one of these States will not be able to benefit from the provisions of the conventions.

Article 1 of the OECD Model Convention on the Avoidance of Double Taxation on Succession specifies that the term "resident" refers to an individual who at the time of death was domiciled in one or both of the contracting states.

The Conventions concluded by the Republic of Moldova, referring to the subjects they cover, also use the term "national person" to designate [16]:

- any natural person who is a national of a Contracting State;

- any legal person, company or association which has been granted this status in

under the law in force in the Contracting State.

Tax treaties must specify which is the "competent authority" to implement its provisions, to resolve disputes arising in the course of the treaty, to transmit information to which the contracting parties have committed themselves; in some countries the Ministry of Finance is the competent authority [17], while in others this responsibility is entrusted to another body.

REFERENCES:

1. I. Văcărel, *International Fiscal Relations*, Romanian Academy Publishing House, Bucharest, 1995, p. 59.
2. OECD Model Convention of 1977, Art.2, para. 2.
3. Agreement between the Government of the Republic of Moldova and the Government of the Russian Federation on the avoidance of double taxation of income and property and the prevention of fiscal evasion, art.2 para.4, published in the official edition "International Treaties", 1999, volume 21, p.232.
4. Official Gazette No. 1 of 29 July 1994.
5. Law No. 108-XIII of 17.05.94 on the state border of the Republic of Moldova, published in the Official Monitor of the Republic of Moldova No. 12 of 03.11.
6. For example: New Caledonia, Guadeloupe, Martinique, Reunion, French Polynesia and other overseas territories of France.
7. Agreement between the Government of the Republic of Moldova and the Government of the Russian Federation on the avoidance of double taxation of income and property and the prevention of fiscal evasion, published in the official edition "International Treaties", 1999, volume 21, p.232.
8. Art. 1, OECD Model Convention.
9. See: C. Leicu, *Elimination of double taxation in customs-commercial relations*, Lumina Lex, Bucharest, 1995, p. 82.
10. Art. 4, OECD Model Convention.
11. Not all normative acts in the Republic of Moldova stipulate the same definition of the institution of resident. The Regulation on foreign exchange regulation on the territory of the Republic of Moldova defines residents in Art. 19:
 - A natural person who is continuously on the territory of the Republic of Moldova for one year or more.
 - Legal persons, including sole proprietorships and limited partnerships, which are located and registered in the Republic of Moldova, as well as permanent representative offices of such legal persons, sole proprietorships and limited partnerships, located abroad.
 - Subsidiaries registered in the Republic of Moldova of legal persons, sole proprietorships and limited partnerships established outside the Republic of Moldova.
12. It can be seen that in most of the conventions concluded by the Republic of Moldova the term permanent representation is used, while in those concluded by Romania the term permanent establishment is used to designate the same concept. See: Article 5 of the Convention between the Government of Romania and the Government of Ukraine for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital, signed in Ismail on 29 March 1996.
13. See: Art. 5, points 6,7 of the Convention between the Government of Romania and the Government of Ukraine..., signed at Ismail on 29 March 1996.
14. See Article 4, paragraph 2, of the Agreement between the Government of the Republic of Moldova and the Government of the Russian Federation on the avoidance of double taxation of income and property and the prevention of fiscal evasion, signed in Moscow on 12 April 1996, published in the official edition "International Treaties", 1999, volume 21, page 232.
15. See: Article 4, paragraph 2, letter d, of the Convention between the Government of Romania and the Government of Ukraine ..., signed at Ismail on 29 March 1996, states that "if the person is a national (citizen) of both Contracting States or of neither of them, the competent authorities of the Contracting States shall settle the matter by mutual agreement."
16. Convention concluded between the Republic of Moldova and Russia, Art. 3 para. 1 lit. "f".
17. The Ministry of Finance is the competent authority in the Republic of Moldova, Ukraine, Russia, Romania, Japan, Belgium, Finland, Sweden, Spain, Egypt, etc.